TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 746

THE PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, AND THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, APPELLANTS,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, ATTORNEY GENERAL OF THE STATE OF OHIO, AND PITTSBURGH COAL COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

FILED FEBRUARY 6, 1936.

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INDEX.

	Original	Print
Record from D. C. U. S., Southern Ohio	1	1
Petition to enjoin, etc., order of Public Utilities Commission of Ohio	1	1
Appendix "A"—Report and order of Commission, March 26, 1935, No. 9113	14	8
Præcipe for subpœna	66	43
Subpœna and return	67	43
Answer of defendants	70	44
Application for interlocutory injunction	78	49
Motion for interlocutory injunction	81	51
Notice of hearing	82	51
Motion of B. & O. R. R. Co. et al. for leave to intervene	83	52
Order allowing petition of intervention	86	54

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	Original	Print
Record from D. C. U. S., Southern Ohio—Continued.		
Petition of intervention of B. & O. R. R. Co. et al	88	54
Petition of Pittsburgh Coal Co. for leave to intervene	94	56
Order allowing petition of intervention	105	61
Answer of Pittsburgh Coal Co	107	61
Affidavit of A. S. Jennings	115	66
J. A. Ferguson	119	68
Decree	123	69
Exhibits of Pennsylvania Ry. Co.:		
No. 1—Complaint before Public Utilities Commission, Docket No. 9113	125	71
Answer of Pensylvania Railroad Co	135	79
No. 2—Proceedings and testimony before Public Utilities Commission	137	81
Caption	137	81
Colloquy	140	82
Testimony of Wm. E. Fowler	156	93
J. D. A. Morrow	219	144
Wm. E. Fowler (recalled)	256	173
Motion to dismiss	270	184
Colloquy	271	185
No. 3—Exhibits offered before Public Utilities Commission	282	192
1—Wheelage report	282	192
2—Shipping order	283	192
3—Freight waybill	284	193
4—Wheelage report	285	194
5—Daily interchange report of cars	287	196
6—Wheelage report	288	197
7—Daily interchange report of cars	289	198
8—Interline switching waybill	290	198
9—Wheelage report	291	199
10—Shipping order	292	200
11—Freight waybill	293	200
12—Interline switching waybill	294	201
13—Shipping order	295	201
14—Freight waybill	296	202
15—Interline switching waybill	297	202
16—Shipping order	298	203
17—Freight waybill	298-a	203
18—Interline switching waybill	299	204
No. 4—Circular No. 308 of Eastern Demurrage & Storage Bureau, dated September 21, 1934 and correspondence relating thereto	300	204
No. 5—Proceedings in D. C. U. S., Northern Ohio, No. 4533-E	305	209
Memorandum opinion, West, J.	306	209
Decree	309	211
Findings of fact and conclusions of law	310	212

	Original	Print
Record from D. C. U. S., Southern Ohio—Continued.		
Exhibits of Pennsylvania Ry. Co.—Continued:		
No. 6—Report and order of Public Utilities Commission of Ohio, March 26, 1935 (copy) (omitted in printing)	317	
Petition for appeal and order allowing same	350	218
Assignments of error	354	221
Petition for maintenance of status quo	358	223
Order staying effective date of order of Public Utilities Commisison of Ohio, etc.	360	223
Bonds on appeal (omitted in printing)	362	
Citation and service (omitted in printing)	365	
Affidavits of service	366	224
Præcipe for transcript of record	368	227
Clerk's certificate (omitted in printing)	371	
Statement of points to be relied upon and designation as to printing record	373	229

[fols. 1 & 2]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

In Equity. No. 1132

THE PENNSYLVANIA RAILROAD COMPANY and THE ERIE RAILROAD COMPANY, Complainants,

v.

PUBLIC UTILITIES COMMISSION OF OHIO and JOHN W. BRICKER, Attorney General of the State of Ohio, Defendants

PETITION TO ENJOIN, ETC., ORDER OF PUBLIC UTILITIES COMMISSION OF OHIO—Filed April 15, 1935

To the Honorable, the Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

The Pennsylvania Railroad Company and the Erie Railroad Company, complainants herein, complain of The Public Utilities Commission of Ohio and John W. Bricker, Attorney General of the State of Ohio, defendants herein, and say:

1. That The Pennsylvania Railroad Company is a railroad corporation organized and existing under the laws of the State of Pennsylvania; that it owns and operates lines [fol. 3] of steam railroad in interstate and intrastate commerce in Ohio, Pennsylvania and other states; that it is engaged in the transportation to and within the City of Youngstown, in the State of Ohio, of bituminous coal originating at mines in those states and handled in interstate and intrastate commerce; that it has a large investment in and maintains extensive switching and terminal facilities in said City for receiving from and delivering to connecting lines, and the delivery to industries on its own rails, of bituminous coal and other commodities handled in interstate commerce, and that it has direct physical track connection with the Erie Railroad Company in Youngstown for the interchange of carload traffic.

2. That the Erie Railroad Company is a railroad corporation organized and existing under the laws of the State of New York; that it owns and operates lines of steam railroad in interstate and intrastate commerce in the states of Ohio, Pennsylvania and other states, and that it has a large investment in and maintains extensive switching and terminal facilities in the City of Youngstown, in the State of Ohio, for receiving from and delivering to connecting lines, and the delivery to industries on its own rails, of bituminous coal and other commodities transported and handled in interstate commerce.

3. That the Public Utilities Commission of Ohio, is an administrative body existing by virtue of the provisions of the General Code of Ohio (Section 487, et seq.) creating and defining its powers and authority.

[fol. 4] 4. That John W. Bricker is the Attorney General of the State of Ohio, the chief law officer of that state, and as such charged with the duty of instituting and prosecuting actions or proceedings for the enforcement of orders of the Public Utilities Commission of Ohio.

5. That the Pittsburgh Coal Company, hereinafter referred to as the "Coal Company", is a corporation organized and existing under the laws of the State of Pennsylvania; that it has extensive bituminous coal mining properties in the said State of Pennsylvania, is engaged in the mining, production, sale of bituminous coal in the said State and the transportation thereof to points in the State of Ohio and other states; that it is authorized to do business in the State of Ohio; that it maintains and operates barges, towboats and other facilities for the transportation of coal by water from its mines in the State of Pennsylvania to points on the Monongahela and Ohio Rivers, and Little Beaver Creek; that it maintains a harbor at Risher, in the State of Pennsylvania, on the Monongahela River, and a harbor or dock facilities at Smith's Ferry, in the State of Pennsylvania, on the Little Beaver Creek, the said facilities including lifting or transfer facilities whereby coal can be unloaded from barges and loaded into railroad cars at Smith's Ferry, in the State of Pennsylvania, on the railroad owned by the said Coal Company; that said railroad of said Coal Company extends from Smith's Ferry, in the State of Pennsylvania, in a northwesterly direction to a

point near Negley, in the State of Ohio; that the said Coal [fol. 5] Company owns and maintains at Brush Run, in the State of Ohio, at a point about two miles southeast of Negley, in said State, and on the line of said railroad, a plant for the washing, cleaning and sizing of coal; and that the western terminus of said railroad of the Coal Company is its junction with the Pittsburgh, Lisbon & Western Railroad, with which it has physical track connection for the interchange of carload traffic.

6. That The Pittsburgh, Lisbon & Western Railroad Company, hereinafter referred to as the "Lisbon", is a common carrier steam railroad corporation, organized and existing under the laws of the States of Ohio and Pennsylvania, and having among others, lines extending from a point near Negley, in the State of Ohio, to Signal, in said State; that it is engaged in the transportation of bituminous coal and other commodities in interstate and intrastate commerce over its lines as aforesaid; that the entire stock of the Lisbon, with the exception of qualifying shares of its directors, is owned by the said Pittsburgh Coal Company; and that at Signal, in the State of Ohio, the Lisbon has a physical track connection with the Youngstown & Suburban Railway Company for the interchange of carload traffic.

7. That the Youngstown & Suburban Railway Company, hereinafter referred to as the "Suburban", is an interurban electric railroad corporation, organized and existing under the laws of the State of Ohio; that it owns and operates by electric power a line of railroad from Signal, in the State of Ohio, to Youngstown, in said State; that it is en- [fol. 6] gaged in the transportation of bituminous coal and other commodities in interstate and intrastate commerce over its line from Signal to Youngstown; that the entire stock of the Suburban, with the exception of qualifying shares of its directors, is owned by the said Pittsburgh Coal Company; that at Youngstown it has a physical track connection with the complainant, The Pennsylvania Railroad Company, for the interchange of carload traffic.

8. Complainants bring this suit in equity against The Public Utilities Commission of Ohio and the Attorney General of Ohio under an Act of Congress, (approved June 18, 1910, c. 309, Sec. 17, 36 Stat. 557; March 3, 1911, c. 231, Sec.

266, 36 Stat. 1162; March 4, 1913, c. 160, 37 Stat. 1013; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, and May 14, 1934, c. 283, Sec. 2, 48 Stat. 775), to enjoin, set aside and annul a certain order made by the Public Utilities Commisison of Ohio in a certain proceeding known as No. 9113, The Youngstown & Suburban Railway Company v. The Pennsylvania Railroad Company and Erie Railroad Company, bearing date of March 26, 1935, and to enjoin the enforcement of said order. The Public Utilities Commission of Ohio is hereinafter referred to as the "Commission". Copy of said order of the Commission and the accompanying report, marked "Appendix A", are hereto attached and by reference made a part hereof. The said order of the Commission was served on complainants herein on March 27, 1935, and by its terms is made effective on or before April 10, 1935. By entry April 5, 1935, said effective date was postponed to and fixed as April 26, 1935.

[fol. 7] 9. The order herein complained of was not made upon the petition of any party hereto, and the matter complained of in the petition before the Commission in the proceeding in which said order was made was the refusal of these complainants, to accord switching service at intrastate switching rates in the City of Youngstown to four carloads of bituminous coal, mined in the State of Pennsylvania, in which petition the Suburban sought an order against complainants requiring them to switch said interstate traffic within the City of Youngstown upon intrastate rates and in disregard of rates published and lawfully on file with the Interstate Commerce Commission.

10. That the coal mined in the State of Pennsylvania, as aforesaid, was moved in a continuous journey down the Monongahela and Ohio Rivers and the Little Beaver Creek to Smith's Ferry in the State of Pennsylvania, where it was loaded in bulk into railroad cars and transported through the Coal Company's cleaning plant at Brush Run, in the State of Ohio, thence to Youngstown, Ohio, all by the water-and-rail transportation facilities of the said Coal Company and the lines of the Lisbon and the Suburban, and at all times in bulk in open top equipment and not in packages; that the said coal was tendered to the complainants at Youngstown, in the State of Ohio, for switching movements by their lines to industries located on and

served by the complainant Erie Railroad Company in the said City of Youngstown; that the Suburban, in tendering the shipments of coal in question to complainants proffered as compensation to these complainants for their services [fol. 8] no more than the basis of rates applicable on coal moving in intrastate commerce in the State of Ohio, and complainants thereupon refused to accept the said shipments until charges, in accordance with their tariffs applicable on interstate commerce and lawfully on file with the Interstate Commerce Commmission, were paid to complainants on the said shipments; that neither the Suburban, the Coal Company, nor any other party, has at any time made a tender to complainants of their lawful charges applicable on interstate traffic, as aforesaid.

11. That upon the refusal of these complainants to accept and switch the said four cars of coal at less than the applicable interstate rates, the Suburban filed with the said Commission its petition in the said case No. 9113 complaining of the said refusal of these complainants to switch the said coal to industries on complainants' lines in the City of Youngstown and praying that the Commission order and direct these complainants to transfer, switch and deliver the shipments in question and any other carloads of bituminous coal likewise loaded, shipped, and billed from the point of physical connection of the Suburban and The Pennsylvania Railroad in Youngstown to consignees located on the Erie in the said City of Youngstown; that hearing was had before a Commissioner and the Commission's rate expert and as a result of said hearing the Commission entered its order of March 26, 1935, and accompanying report, as aforesaid.

12. Complainants aver that the effect of the order herein [fol. 9] complained of, the reported findings of the Commission to the contrary notwithstanding, will be to impose a direct burden on interstate commerce and a direct and undue interference with and regulation of interstate commerce in violation of Paragraph 3, Section 8, Article I, of the Constitution of the United States, and contrary to the provisions of the Act of Congress known as the Act to Regulate Commerce, as amended.

13. Complainants further aver that the said order of the Commission is unlawful and void in that it would deprive

these complainants of their property without due process of law and deny them the equal protection of the law, in violation of Section 1, of Article XIV, of the Constitution of the United States.

14. Complainants further aver that the said order of the Commission would require them to switch coal for the Suburban and the Coal Company in interstate commerce at less than the cost of the service, in contravention of the Fourteenth Amendment to the Constitution of the United States.

15. Complainants further aver that the said order of the Commission does not rest upon legislative authority or direction, but is a mere arbitrary order designed to compel the performance by complainants of a service on interstate traffic under rules, regulations and rates applicable to intrastate commerce in the State of Ohio.

16. Complainants further aver that they are faced with penalties provided by the laws of the State of Ohio for [fol. 10] violations of any order, rule or regulation of the Commission including penalties ranging from $100 minimum, to $10,000 for each offense (and in addition, that a railroad company shall be liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation (Sections 571, 569, General Code of Ohio).

17. Complainants further aver that the said findings and order of the Commission are void because they are without substantial evidence to support them; are contrary to the manifest weight of the evidence; and against the overwhelming preponderance of the evidence.

18. Complainants further aver that the said order of the Commission is not supported by proper and adequate findings.

19. Complainants further aver that the order of the Commission is unreasonable, arbitrary, capricious, and constitutes an unwarranted assumption of power on the part of the Commission.

20. Complainants further aver that the Commission denied to complainants a fair and impartial hearing in the proceedings before it.

21. Complainants further aver that said order of March 26, 1935, is an attempted enforcement of a state statute directly affecting interstate commerce to such an extent as to amount to a regulation thereof.

[fol. 11] 22. That said order will require complainants to disregard and ignore their tariffs lawfully on file with the Interstate Commerce Commission, having application to interstate commerce, and subject complainants to the heavy penalties prescribed by the Interstate Commerce Act. (24 Stat. 379; 25 Stat. 855; 41 Stat. 483).

23. Complainants are without adequate remedy at law.

24. Wherefore, complainants pray:

1. That upon the filing of this bill the presiding judge of this Court shall call to his assistance in the hearing and determination thereof two other judges, at least one of whom shall be a circuit judge;

2. That process may issue against the defendants Public Utilities Commission of Ohio and John W. Bricker, Attorney General, and that after not less than five (5) days' notice of the time and place of hearing having been given to the Public Utilities Commission of Ohio and the Attorney General of Ohio, complainants be granted an interlocutory injunction restraining the Public Utilities Commission of Ohio and the Attorney General of Ohio from enforcing the terms of the order herein complained of, pending final decree;

3. That in view of the fact that said order requires compliance by complainants on or before April 26, 1935, pending the consideration of this application for an interlocutory injunction, and because irreparable damage would otherwise ensue to petitioners this Court grant to petition-[fol. 12] ers a temporary restraining order for a period of sixty (60) days from the date thereof to the same effect as the interlocutory injunction prayed for;

4. That upon final hearing of this cause a decree be entered adjudging said order to be in all respects unlawful and of no effect, and ordering the same to be abrogated, cancelled and forever set aside, and permanently enjoining the Public Utilities Commission of Ohio and the Attorney General of Ohio, their several officers, agents, attorneys,

servants, and all persons acting in their behalf, from taking any steps or instituting or further prosecuting any proceeding to enforce said order; and

5. That complainants be given such other, further and general relief as in equity and good conscience may seem meet.

Henderson, Burr, Randall & Porter, Solicitors for Complainants. Willis T. Pierson, John J. Fitzpatrick, Leo P. Day, Guernsey Orcutt, of Counsel.

[fol. 13] *Duly sworn to by E. W. Smith. Jurat omitted in printing.*

[fol. 14] APPENDIX "A" TO PETITION

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 9113

THE YOUNGSTOWN AND SUBURBAN RAILWAY COMPANY, Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY and ERIE RAILROAD COMPANY, Defendants

Submitted November 30, 1934. Decided March 26, 1935

Report of the Commission

The Youngstown and Suburban Railway Company (hereinafter called the "Y. & S."), an interurban electric railroad, engaged in both intrastate and interstate commerce, (chartered also to operate by steam) here seeks an order which will require The Pennsylvania Railroad Company (hereinafter called the "P. R. R.") as an intermediate line, and the Erie Railroad Company (hereinafter called the "Erie") as a delivering line, to switch and deliver to consignees in Youngstown, Ohio, at rates and charges applicable on Ohio intrastate coal traffic, four carloads of bituminous coal brought into Youngstown by the Y. & S. as a road-haul carrier.

The particular coal in question was shipped, and other coal is expected hereafter to be shipped, from Negley, Ohio, a local point on the line of The Pittsburgh, Lisbon

& Western Railroad Company (hereinafter called the "Lisbon"), and was routed and transported via that line to Signal, Ohio, thence via the Y. & S. to its point of interchange with the P. R. R. in Youngstown, for delivery to the [fol. 15] latter and by it to the Erie, or delivery by the Erie to the consignees. In respect of each of the four carloads of coal, here directly concerned, the shipment and routing were covered by the standard form of shipping order delivered by the shipper, the Pittsburgh Coal Company (hereinafter sometimes called the Coal Company), to the Lisbon at Negley; the Lisbon issued for each carload its uniform bill of lading receipt; the already-performed transportation from Negley via Signal to Youngstown was wholly within the state of Ohio; and the further transportation yet to be performed via the P. R. R. and the Erie would also be wholly within the state of Ohio.

Under these circumstances the Lisbon received and billed the coal, and the Lisbon and Y. & S. transported the coal, as Ohio intrastate commerce, and the charges thereon to Youngstown were fully prepaid at the Ohio intrastate rates. When, however, the traffic was delivered by the Y. & S. to the P. R. R., by placement in the usual manner on the Y. & S.-P. R. R. interchange track at Youngstown accompanied by the usual advice to switch to the Erie for delivery by it to the named consignees, those two carriers declined to receive the same as Ohio intrastate commerce, and the P. R. R. served upon the Y. & S. the following notice:

"Effective at once this company will not accept shipments of bituminous coal carloads from the Youngstown & Suburban Railway at its interchange in Youngstown for delivery to individuals or industries on its own or connecting lines within the switching limits of Youngstown which do not originate at mines within the state of Ohio until all charges from its connection with the Youngstown [fol. 16] & Suburban Railway to point of ultimate delivery are fully prepaid at rates published in tariffs on file with the Interstate Commerce Commission."

Upon receipt of the notice the Y. & S. tendered to the P. R. R. in lawful money the amount of its and the Erie's switching charges on the four carloads of coal, immediately concerned, at the rates applicable to Ohio intrastate com-

merce. That practice had never previously been followed with respect to other coal which had theretofore been interchanged, because such payment of charges had been "satisfactorily arranged" between the parties in accordance with published tariff provisions, on file with this Commission.

The P. R. R. and the Erie declined to accept the switching charges as tendered by the Y. & S. and continued their declination to receive the cars, upon such tender of the charges by the Y. & S., and have ever since continued such declination. The four carloads of coal continued and now continue to stand on the Y. & S.-P. R. R. interchange track at Youngstown, offered in such manner by the Y. & S., and declined in such manner by the P. R. R. and the Erie. Telephone notice of the declination was given by the Y. & S. to the shipper, and the Y. & S. filed this complaint on September 29, 1934.

The charges of the complaint are that the P. R. R. and the Erie have failed, omitted, and neglected, and threaten to continue to fail, omit, and neglect, without unreasonable delay to transfer, switch, and deliver the four carloads of coal, here directly concerned, and thus have failed, [fol. 17] omitted, and neglected, and threaten to continue to fail, omit, and neglect to furnish reasonably adequate service and facilities for this alleged Ohio intrastate commerce, all in violation of the General Code of Ohio, and particularly of Sections 504, 504-2, 527, 614-42, and 614-67. The prayer is that the defendants be required to transfer, switch and deliver these four carloads of coal, and other similar coal shipments, to consignees located on the Erie in the city of Youngstown, Ohio, at the rates and charges applicable on Ohio intrastate coal traffic.

The Baltimore and Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburgh & Lake Erie Railroad Company, and the New York Central Railroad Company, common carrier steam railroads engaged in the transportation of persons and property, including coal in both intrastate and interstate commerce to Youngstown, and other points in Ohio, in competition with the complainant and the defendants, intervened as parties to the proceeding.

We note that complainant also expects future intrastate commerce in the product of a low temperature coal distillation plant which the Coal Company expects to con-

struct at Brush Run, near Negley, when some of these pending issues are cleared up, and which product is expected to be marketed in northeastern Ohio territory, as domestic fuel and as a substitute for low-volatile coal in the manufacture of coke.

Defendants admit that they have published and filed, and that there are thus legally established rates available and applicable to this switching transportation of coal in [fol. 18] Youngstown, whether the traffic is interstate or intrastate, in either instance. The primary issue for determination by this Commission is, therefore, whether this particular traffic is Ohio intrastate commerce.

The various documents which evidence the shipment of the four cars of coal and their delivery by the shipper, the Pittsburgh Coal Company, to the Lisbon at Negley; the receipt thereof by the Lisbon; the movement thereof by the Lisbon and the Y. & S. to Youngstown; and the tender of the same by the latter to the P. R. R. for transfer to and delivery to the consignees by the Erie, are all before us. The four cars are described therein as follows:

Date	Car			
Shipped	Initial	Number	Lading	Consignee
9/17/34	CCCStL	79123	Furnace coal	Youngstown Ice Co.
9/17/34	MC	10990	Nut, Stoker and Slack Coal	Republic Rubber Co.
9/17/34	CCCStL	82713	do.	do.
9/17/34	P&LE	50767	Block Coal	Youngstown Ice Co.

These documents evidence the prepayment in full by the shipper of the charges for the transportation, at the lawful Ohio intrastate rate of 60 cents per net ton from Negley to Youngstown. Also, if this traffic is intrastate, the switching charges of the P. R. R. and the Erie will be absorbed by the Y. & S. up to a maximum of 19 cents per ton, which figure, under the defendants' tariffs applicable to their switching service at Youngstown in Ohio intrastate commerce, is more than the amount of their switching charges. Therefore, as Ohio intrastate commerce, this coal would be delivered to the consignees at the flat rate of 60 cents per ton from Negley to Youngstown.

[fol. 19] However, if the switching service be interstate in character, the charges would not be at the switching rates of the P. R. R. and Erie, for none such are published and available on interstate shipments of coal Ex-Y. & S. In lieu thereof the defendants would assess their local

rates for road haul transportation of coal from Youngstown to the next station beyond on their respective lines, as shown below:

Via P. R. R., Youngstown to Struthers, 76 cents per net ton.

Via Erie, Youngstown to Girard or Hubbard, $1.13 per net ton.

We have recently had occasion in two proceedings, jointly heard and disposed of, to consider at considerable length the subject of switching rates of the Steam railroads on coal and coke ex-Y. & S. Ry. in Youngstown. Switching Rates and Service at Youngstown, Ohio (I. & S. Docket No. 142), and The Youngstown and Suburban Railway Company v. The Baltimore & Ohio Railroad Company, et al., (Docket No. 8833). The purpose of that complaint was to secure the establishment of such switching rates as will permit coal and coke which the Y. & S. road-hauls to Youngstown, in Ohio intrastate commerce, to be delivered in Youngstown at the flat Youngstown rate to any consignee located on any other railroad in Youngstown, as is now possible with respect to all other coal and coke by whatever line it may be road-hauled to Youngstown, and as is now possible with respect to all commodities other than coal and coke road-hauled into Youngstown by the Y. & S. (Mimeograph Sheet 10). It there appeared that the purpose of the trunk lines in Youngstown [fol. 20] was to make applicable on such switching in Ohio intrastate commerce of coal and coke, the same rates as are now applicable for the interstate switching of coal and coke ex-Y. & S. Ry., those rates being, as previously stated, the road-haul rates of the switching carrier to the next station beyond Youngstown. In that proceeding we found those rates as applied for switching in Youngstown to be unlawful, as to Ohio intrastate traffic, and we prescribed reasonable rates for the future.

The locus of the transportation of these four cars of coal from Negley to Youngstown, and their future transportation in Youngstown, is wholly within this State. There is nothing in the various documents evidencing the transportation that attaches to it any character other than Ohio intrastate commerce. But we recognize that it has long been settled that:

"Whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states, the mere arrangements of billing or plurality of carriers do not enter into the conclusion." South Covington etc. Street R. Co. v. Covington, 235 U. S. 537, 545, and cases there cited;

also that:

"The essential nature of the movement, and not the form of the bill of lading, determines the character of the commerce involved." Illinois C. R. Co. v. De Fuentes, 236 U. S. 157, 163, and cases there cited;

[fol. 21] and again that:

"The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars." Atlantic Coast L. R. Co. v. Standard Oil Co., 275 U. S. 257, 268, and cases there cited.

We also recognize that, under the law, there is a distinction as between "mere transportation between states by private non-common-carrier facilities" and "interstate commerce subject to government regulation." This point will be dealt with later herein. The rule, therefore, is that the character of this commerce is something to be determined by weighing the whole group of facts presented with respect to it.

The Pittsburgh Coal Company, the shipper, does not own or operate a mine at Negley; it owns coal acreage in Pennsylvania and also in eastern and southern Ohio. In its Pennsylvania acreage it owns seven mines located on the Monongahela River, two of them being now in operation. At one of these river mines it mined certain coal, of a grade and quality not produced in this State; it transported that coal a total distance of about 6½ miles by its own private mine tracks and private motive power to its own tipple on

[fol. 22] the river; and at the tipple it dumped the coal into its own barges for river movement. Throughout all this time the coal was raw run-of-mine coal; it was unsold; it was not consigned to anyone; and its destination was not known.

The particular barge containing this coal was then towed down the Monongahela River by a towboat, owned by the Coal Company, to a private harbor owned by the Coal Company at Risher, Pa., and was there held for several weeks, loaded and awaiting disposition, but unsold. It was later further towed from Risher by the Coal Company's own towboat down the Monongahela and Ohio rivers to the Coal Company's transfer on the Little Beaver River at Smith's Ferry, Pa., with the coal all the while owned by the Coal Company, and remaining unsold and unconsigned to anyone. In its ordinary operation the Coal Company would not take a single barge of coal down to Smith's Ferry; the coal transferred there would be parts of tows going further down the Ohio River to Steubenville and other points. If an entire tow were taken down to Smith's Ferry the barges would be tied up and held there as a reservoir of coal which would be moved up to the preparation plant at Negley as required.

At the Smith's Ferry transfer the Coal Company with its own facilities lifted the coal from the barge and loaded it into cars owned by the Coal Company and standing on the Coal Company's private track, the coal being all the while unsold and unconsigned to anyone. The various private cars so loaded with coal from the barge were then hauled by the Coal Company's own locomotive over its private [fol. 23] track to its coal cleaning and preparation plant at Negley, still unsold and unconsigned to anyone.

The Coal Company's plant at Negley,—also known as its Brush Run plant,—is a plant designed to receive raw run-of-mine coal and to wash, clean, size, and prepare it for market. As the cars of raw run-of-mine coal come into the plant the contents are dumped into a big receiving pit; the coal is then elevated by belt conveyor about 50 feet up into the preparation plant; it then comes down through washing and other cleaning facilities, in the course of which the various impurities such as slate, rock, pyrites, mica, calcite, gypsum, and various other impurities, which exist in the raw run-of-mine coal, are removed; and it then goes over

sizing screens and is run into common carrier railroad cars for shipment to the consignees. The plant is designed and is equipped to make 25 different sizes of coal and to mix them in any sort of proportions desired by the purchaser. These particular four cars of coal, here directly involved, were thus cleaned, sized, and prepared at the Brush Run plant in accordance with the specific orders of the individual consignees to whom the coal was then billed and shipped from the plant.

There are no facilities at the mine where this coal was originally produced which would permit of its washing, cleaning, sizing, and preparation in the manner done to meet the purchaser's specifications at Brush Run. There are no such facilities at any of the Coal Company's river mines, or at any point between those mines and Negley. The Brush Run plant is located where it is, among other reasons, in order to permit the concentrated washing, cleaning, sizing, and preparing of coal from all the Coal Com- [fol. 24] pany's river mines at the one place. This practice of concentrating such activities has been followed by the Coal Company with respect to its inland mines for several years past.

The Brush Run plant has a capacity of about 350 tons of raw coal per hour; a carload of 50 tons will go through the plant in about nine minutes; an individual lump of coal will go through in about 4½ minutes. In the plant process about 4 per cent of the inbound material comes out as impurities and is wasted at the plant location. The prepared coal will be sold out of the Brush Run plant and will be loaded at the plant directly into common carrier railroad cars for shipment to consignees. Some unsold coal, perhaps three or four cars, may stand over at the plant for a few days, and will be held in common carrier railroad cars. Under present operations coal will not be accumulated in piles at Brush Run after it is cleaned; there would be no object in that, and degradation of the coal would be increased with the additional handling. Flexibility in the plant operation will be accomplished by holding loads of raw run-of-mine coal in the Coal Company's private cars, in addition to the supply in barges at Smith's Ferry. Thus, upon the facts surrounding the handling of this coal up to the time it was actually loaded in common carrier railroad cars at, and shipped from, Negley, it appears that the coal

throughout was in the ownership and possession of the Pittsburgh Coal Company and that there was no change of title in the coal at any stage of its movement from the mine to Negley. The character of the coal continued as raw run-of-mine coal until it came through the Negley [fol. 25] plant and was then loaded and shipped in the required specified sizes. There was no consignment of the coal by the Pittsburgh Coal Company to any other party and there was no dealing in, and no business transactions with other parties with respect to, the coal, up to the time of shipment from Negley. There was no common carrier transportation of the coal to Negley as the track from the mine to the river tipple, the towboats and barges on the river, and the track from the river to Negley were and are all the private facilities of the Coal Company. There was no maintenance of any original package of shipment, but instead, there were several distinct packages—mine cars from the mine to the river tipple, river barges from the tipple to Risher and [illegible] Smith's Ferry, and private railroad cars from Smith's Ferry to Negley. There was no continuity of movement to Negley.

It appears that when the coal moved from Risher, Pa., to Smith's Ferry, Pa., it was with the likelihood that it or some of it might be transferred at Smith's Ferry to the Coal Company's private cars and moved thence to Negley over the Coal Company's private railroad. But there was no commerce in this coal in the course of the movement up to Negley, with respect to the final destination of the coal, the actual consignees, or the form in which it would be shipped, from Negley. For at Negley the character of the raw run-of-mine coal underwent a complete change by a process of manufacture, as a result of which and to meet the requirements of the purchasers, it became in part furnace coal, in part block coal, and in part a mixture of nut, [fol. 26] stoker and slack coal, but all of it cleaned of the various impurities inherent in the raw product of the mine. The orders of the purchasers for these particular kinds and sizes of coal were filled and could only be filled at the Brush Run plant, because the facilities necessary for the cleaning and preparation of the raw run-of-mine coal from river mines are located there and are not located at the mine or at any other point between the mine and Negley.

The Coal Company also contemplates the construction at Brush Run of a plant for the carbonization of the smaller sizes of coal to produce a smokeless, sootless fuel for household and industrial use. A similar low-temperature plant serving inland mines is in commercial operation in Pennsylvania with orders for such fuel in excess of plant capacity. This product has a wide variety of uses and among other things will take the place of Pocahontas coal shipped from southern West Virginia into northeastern Ohio to mix with other coal in the manufacture of coke in blast furnaces. The Coal Company expects that this low-temperature fuel can be mixed with the western Pennsylvania coal and save the steel industry of northeastern Ohio a considerable sum of money.

Whether the transportation be considered as one from the mine to Negley or as one from Smith's Ferry to Negley, there is admittedly an interstate feature connected with it. But this was not common carrier transportation.

Private facilities of transportation, all of them owned and operated by the Coal Company, were the only facilities [fol. 27] used; and none of such private facilities are subject to regulation under federal law by the Interstate Commerce Commission, or under Ohio law by this Commission. This is so because the Interstate Commerce Act specifically provides in section 1 (1) that it "shall apply to common carriers engaged in (a) the transportation of * * * property"; and further, in section 1 (3) that "wherever the word 'carier' is used in this Act it shall be held to mean 'common carrier.'" Our Ohio Code, in Section 501, defines the term "railroad" as including those who own, operate, manage or control a railroad or part thereof "as a common carrier in this state"; also, under Section 503, it is specifically provided that,—

"This chapter will not apply to street and electric railroads engaged solely in the transportation of passengers within limits of cities, or other private railroads not doing business as common carriers."

This track of the Pittsburgh Coal Company extending from Smith's Ferry to Negley, a distance of approximately 11 miles, has recently been the subject of litigation. The P. R. R., one of the defendants herein, and The Pittsburgh

& Lake Erie Railroad Company, as plaintiffs in the United States District Court for the Northern District of Ohio, Eastern Division, sought to enjoin the construction of that track on the ground that that construction had not been authorized by a certificate of public convenience and necessity of the Interstate Commerce Commission, under the provisions of Section 1, paragraph 18-22, of the Interstate [fol. 28] Commerce Act. A final decree in that proceeding has denied the injunction sought and dismissed the bill, and the matter is now on appeal in the Circuit Court of Appeals for the Sixth Circuit. In his memorandum opinion filed October 2, 1933, The Pennsylvania Railroad Company et al. v. The Pittsburgh, Lisbon & Western Railroad Company et al., in Equity No. 4533, overruling the plaintiffs' motion for a preliminary injunction against the construction, United States District Judge West held that the track in question was not a common carrier, saying:

"The proof submitted by defendants that the new track from Negley to Smith's Ferry is a purely private enterprise of the Pittsburgh Coal Co. and will not be devoted to common carriage in any sense, greatly outweighs that of the plaintiffs to the contrary.

"As I understand Sec. 1, pars. (18) to (22) Tit. 49, U. S. C., these provisions have no application to a privately owned track over which a producer owning the same carries his goods to an interstate point for preparation for market. See the Pipe Line Cases, 234 U. S., 548, 561-562."

In its ultimate findings of fact filed by the District Court on January 22, 1934 in support of its final decree, it was held that:

"10. The Coal Company intends to employ on all said trackage between Smith's Ferry and the Lisbon connection only its own locomotives and cars handled by its own employees. And will make or permit no use of said trackage or equipment except for transporting its own coal and [fol. 29] products. Said tracks have not been and will not be devoted to or suffered or permitted to be used in any common carrier service whatever or by any common carrier, but with said aforementioned docks and plants, constitute a purely private and privately owned enterprise of defendant Pittsburgh Coal Company and not an extension of said Lisbon railroad. Said trackage is intended to afford

said Coal Company cheaper transportation to its markets than can be given by the plaintiffs."

The Court's conclusions of law included the following:

"2. That the defendant Pittsburgh Coal Company has the lawful right, power and authority under its charter and the laws of the State of Ohio and the Commonwealth of Pennsylvania, to construct and operate as a private enterprise, its private railroad tracks constructed on its own land connecting its unloading dock on the Little Beaver near Smith's Ferry, Pa., with its preparation plant at Brush Run, near Negley, Ohio, as well also as its private tracks connecting its said plant at Brush Run with the spur of the common carrier defendant, Pittsburgh, Lisbon & Western Railroad, near Negley.

"3. That the construction and operation of said private railroad tracks by defendant Pittsburgh Coal Company for its own purposes, is not within the provisions of Section 1, paragraphs 18 to 22 of the Interstate Commerce Act requiring a certificate of public convenience and necessity first to be obtained from the Interstate Commerce Commis- [fol. 30] sion in certain instances, nor can the before-mentioned private railroad tracks of the defendant Pittsburgh Coal Company be deemed or construed to be an extension of the lines of the common carrier defendant, Pittsburgh, Lisbon & Western Railroad Company, within the meaning of said Act."

"6. That the privately owned and operated track of the defendant Pittsburgh Coal Company is a lawful enterprise and being lawful may not be adjudged unlawful through the application in this case of the rule that corporate entities may be disregarded to prevent abuse of public rights."

It may be observed that the trunk line petitioners in that litigation stressed the intercorporate relationship between the Pittsburgh Coal Company and the Y. & S. and the Lisbon, in their endeavor to prove their point. In this proceeding the trunk lines, who are here defendants, also refer to that intercorporate relationship but they expressly deny any imputation of unlawfulness therein.

To all intents and purposes, when this coal was finally shipped from Negley, it was in no different standing in law than if it had been privately trucked to the preparation

plant at Negley from some point outside the State of Ohio. At Negley the entire character of the coal went through a complete change. The original packages were entirely lost sight of in a general commingling of the mass; the coal was put through what is substantially a manufacturing process, as a result of which there remained but 96 per cent of the [fol. 31] original volume of raw coal, and this was an entirely different kind of product; extraneous matter had been removed; sizes had been made and mixed to meet the particular requirements of individual purchasers; and it was only after all of this that the requirements of the individual purchasers were loaded in common carrier cars and shipped. Then for the first time this coal became an article of commerce, subject to government regulation.

The question remaining for determination is whether the circumstances and conditions under which this coal reached Negley, entirely by private facilities, are such as attach to the shipments from Negley to Youngstown, entirely by common carrier facilities and wholly within the State of Ohio, the legal character of interstate commerce, sufficiently to deprive this Commission of jurisdiction over the issue which is here presented.

We pass as elementary and requiring no discussion the argument of the defendants that this Commission cannot regulate commerce among the several states. We observe instead that defendants admitted upon hearing that the only point here to be determined is whether this traffic is interstate or intrastate in character; and that they also admitted that in either event rates are available upon which the traffic can move from the Y. & S. via the P. R. R. to the consignees located on the rails of the Erie in Youngstown.

A second plea interposed by the defendants to our jurisdiction in this controversy is that the statute gives the Commission no authority over interchange arrangements between the Y. & S. as an interurban line and the defendants [fol. 32] as steam railroads. Section 522 of the General Code is specifically relied upon, together with several decisions of the Supreme Court of this State, none, however, reported later than the 85th volume. In all of this defendants overlook that, (1) under Section 501 of the General Code the term "railroad" means and embraces interurban railroad companies; (2) the Supreme Court so specifically held with respect to the Hocking-Sunday Creek Traction

Company, an interurban electric railroad, in Hocking Valley Railway Co. v. Public Utilities Commission, 107 Ohio State 43, 48; (3) under Sections 524 and 525 railroads (which by Sections 501 and 614-2) include interurbans) may complain to this Commission against any regulation or practice affecting the transportation of property; (4) Section 614-42 commands that steam railroads and interurban railroads whose tracks connect (as do those of complainant and defendants herein) so as to admit the passage of cars, shall afford all reasonable and proper facilities for the interchange of traffic, for forwarding and delivering property, and without unreasonable delay or discrimination shall transfer, switch, and deliver freight cars to points on connecting lines; and (5) Section 527 empowers this Commission in a proceeding such as this to make such orders as shall be reasonable to be observed in the future, to cure unreasonableness, or unjust discrimination, or inadequacy, in service.

We find, therefore, that there is no lack of statutory jurisdiction in this Commission to consider and determine the issues here presented, and to provide the relief which the [fol. 33] complainant seeks if the facts so warrant.

A third proposition advanced by the defendants in the nature of a jurisdictional plea, is that the complaint should be dismissed because it is not brought by the real party in interest. The point endeavored to be made is that the complainant "is merely the *alter ego* of and dominated by the Pittsburgh Coal Company through stock ownership"; "that the Pittsburgh Coal Company is the shipper of the traffic here involved"; "that freight charges covering the transportation service of the Lisbon and the Y. & S. were fully prepaid at Negley, Ohio"; "that the P. R. R. and the Erie likewise, demand the prepayment of their charges based on the legally applicable rates published in tariffs on file with the Interstate Commerce Commission"; and that "the Y. & S. could, and should have prepaid the charges demanded, and permit the shipper or consignee, whichever one paid and bore the disputed charges, to raise the issue as to the legality of the collection".

Stock control of the Y. & S. and Lisbon by the Pittsburgh Coal Company, even though the latter be a shipper over those roads, and even though it constructed the private track from Smith's Ferry to Negley, is not violative of Ohio law and the defendants herein expressly admit that, by

their reference upon hearing to such control, they do not "impute anything unlawful".

As to the suggestion that the Y. & S. should have paid the disputed charges and permitted the question here to be determined upon a suit to recover the excess, if any, we observe that the charges demanded by the defendants for [fol. 34] the switching in Youngstown are at rates manifestly prohibitive and far exceed what the Lisbon and Y. & S. collected for their road-haul transportation to Youngstown.

The facts show that the Y. & S. is a common carrier in possession of these particular four cars of coal under that provision of the Uniform Bill of Lading contract whereby it agrees "to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination." That provision of the bill of lading is laid upon the Y. & S. as a carrier in possession of the property under the contract; it is binding in the absence of any provision expressly denying its force and effect; and there is no such latter provision in the Uniform Bill of Lading contract covering these shipments. Under that contract the owner is obligated to pay only the lawful charges accruing on the property, and in this respect the defendants admit that the charges from Negley to Youngstown were "fully prepaid," although the prepayment was at the Ohio intrastate rates.

There was nothing in the transportation documents, which on their face covered only intrastate Ohio commerce, to indicate that the commerce was anything other than Ohio intrastate commerce, and under the circumstances the Y. & S. compiled with its legal duty in tendering to the P. R. R. and the Erie the amount of their switching charges at the Ohio intrastate rates for such service. Having made such a tender and the same having been refused, and the P. R. R. and the Erie having continued thereafter to refuse [fol. 35] to switch and deliver the property, the Y. & S. was entitled, in order to comply with its agreement to deliver the property to the next carrier on the route to the destination, to bring and maintain this action before this Commission for an order requiring the P. R. R. and the Erie to receive and deliver this traffic at the Ohio intrastate rates as tendered by the Y. & S., if the traffic is in fact intrastate in character.

In determining the issue here presented it is necessary that there be kept in mind the distinction between transportation and commerce, and between commerce conducted by common carrier railroads among the states and transportation by private railroads. It is the commerce of common carriers that is the subject of regulation by the federal government, when interstate in character, and is the subject of regulation by the State of Ohio when wholly within this State; but neither the federal nor the Ohio state laws embrace transportation by private parties within their respective schemes of regulation of commerce. This, as we understand it, is the principle of the decision of the United States Supreme Court, although it there dealt with pipe line transportation of oil, in the Pipe Line Cases, United States v. Ohio Oil Co., 234 U. S. 548, 559-562.

The Pipe Line Cases were decided in 1914, at a time when the Interstate Commerce Act, by the Hepburn Amendments of 1906, applied:

"to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly [fol. 36] by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act." (pp. 557-558)

This constituted a legislative declaration, obviously under the commerce clause, that pipe lines transporting oil in interstate commerce were common carriers and should be subject to regulation as such. As to all but one of the pipe lines the Court said (p. 560):

"The only matter requiring much consideration is the constitutionality of the act. That the transportation is commerce among the states we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. (citing cases) The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that make it transportation within the act."

But as to the one other pipe line, the Court found on the facts that it was without the pale of regulation, saying:

"There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a per- [fol. 37] version of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery, for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end." (pp. 561-562)

In the instant case, the transportation of the coal was by private facilities from the mine to Negley; it did not begin to purchase or end in sale; the coal remained throughout as raw run-of-mine coal in the ownership and possession of the Coal Company; and the Coal Company also owned and operated all the facilities of transportation. In that respect the Coal Company, in our opinion, was and is in the same position as was the Uncle Sam Oil Company in the Pipe Line Cases. This is so because the transportation of the coal from the mine to Negley was wholly private; the transportation from Smith's Ferry to Negley, across the Pennsylvania-Ohio boundary, although wholly by railroad, was by private railroad only. All such private transportation is without the pale of federal regulation, which embraces only such transportation as is performed by common carriers.

The underlying principle of the Pipe Line Cases was recognized as one long established in the decided cases and [fol. 38] was relied upon by the Supreme court in its decision in the previous year in Santa Fe, P. & R. R. Co., v. Grant Bros. Constr. Co., 228, U. S. 177. In that case the railroad company had entered into a construction contract with Grant Brothers, and therein had provided for transportation over the railroad company line of certain of the construction materials at rates lower than the lawful established rates applicable to the same traffic as interstate commerce. The question to be decided was the lawfulness of

such a contract by a common carrier railroad subject to the Interstate Commerce Act and the Court said (p. 188):

"It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work when it is a part of the contract, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See Re Railroad-Telegraph Cos., 12 Inters. Com. Rep. 10, 11."

That case being authority for the proposition that a common carrier railroad subject to the Interstate Commerce Act may nevertheless engage in interstate transportation not subject to that act, because not commerce, makes it clear, we think, that the interstate transportation of a private carrier, in no wise involving other parties, is not within the provisions of the Interstate Commerce Act.

[fol. 39] The same general principle of the Grant Bros. case and the Pipe Line Cases has had later and recent application by the federal courts, including the Supreme Court. In Campbell River Mills Co. v. Chicago, M., St. P. & P. R. Co., 42 F. (2d) 775, it appeared that logs were transported by a private logging railroad from points in a contiguous area of timber, lying partly in Canada and partly in the state of Washington, to Columbia, a point in the latter state, on the line of the Milwaukee Railroad. Upon arrival at Columbia the loaded log cars, without change in lading and in the precise package in which they had left the timber, having sometimes been loaded in Canada and sometimes in Washington, were placed by the motive power of the private railroad on a side track connected with the Milwaukee Railroad, and were delivered to the latter for shipment via a wholly interstate route to Bellingham, Washington. The Milwaukee Railroad then transported these loaded log trucks to Bellingham, at which point the logs were dumped into Bellingham Bay and delivered to the Mill Company which sold approximately ten per cent of the logs locally, and after obtaining the neces-

sary export permit and paying the necessary import duties, towed the remaining 90 per cent to its mill at White Oak, B. C., for manufacture into lumber. The question which arose was whether the transportation of the Milwaukee road from Columbia to Bellingham was intrastate or interstate in character, and the District Court held (pp. 777-778):

"The Interstate Commerce Act, as amended Acts of Cong. June 29, 1906 (34 Stat. 584), April 13, 1908 (35 Stat. [fol. 40] 60); June 18, 1910 (36 Stat. 539), May 29, 1917 (40 Stat. 101), August 10, 1917 (40 Stat. 272), and February 28, 1920 (41 Stat. 456) applies to common carriers engaged in transportation of property under a common control for continuous shipment, but does not apply to goods of foreign origin but not *shipped* from a foreign country.

" 'Shipment' is the act of dispatching or delivery on board of the carrier. (citing cases) A common carrier is one who undertakes to transport for hire from one place to another goods for such as employ him. (citing cases) A concern is not a common carrier carrying only its own products. (citing cases)

"The logs in issue had not entered commerce until committed for *shipment*. Commerce is a practical legal conception drawn from the course of business. Savage v. Jones, etc., 225 U. S. 501. There is a distinction between interstate commerce and interstate transportation. One is governed by the nature of the business; the other by the nature of the particular transportation. 'Commerce' is within inhibitions of the Sherman Act (15 U. S. C. A. Sections 1-7, 15), but 'transportation' may have no relation to interstate rates on shipment of the same goods within the same state (citing cases)."

Thus the District Court clearly recognized the distinction between the transportation by the mill company of its own goods over its own railroad, on the one hand, and commerce incident to transportation, on the other. This was made even more clear by the Circuit Court of Appeals in sustain-[fol. 41] ing the decision of the District Court,—see Chicago, M. St. P. & P. R. Co. v. Campbell River Mills Co., 53 F. (2d) 69. The Circuit Court of Appeals in this opinion proceeded to an elaborate analysis of Section 1 of the Interstate Commerce Act and concluded that (p. 72):

"Accordingly, chapter 1 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1 et seq.) does not apply to common carrier shipments wholly within one state where the goods have been brought into that state from a foreign country, provided such bringing in is by agencies other than a common carrier. Such a situation is the one with which we are concerned here.

"Pursuing the reasoning further, we find that, if the act of Congress excepts such shipments from its provisions, they may be regulated by the state, so far as freight rates are concerned."

And further, at page 73:

"If, as we have seen, Congress did not intend to empower the Interstate Commerce Commission to fix rates upon shipments introduced into this country from a foreign country by other than common carrier agencies, the department of public works of the state of Washington had jurisdiction over a cause involving rates on a shipment wholly within the state, the logs having been brought into the state by a private carrier."

Concluding, the Court said (pp. 73-74), what we may observe is the fact in the case before us:

"The appellant cites no case in which a state commission has been found without power to regulate rates on intra-[fol. 42] state shipments of goods brought into the state by agencies other than common carriers. The appellant does cite decisions, however, in which it was held that goods brought into a state by private carriers, though transported by common carriers between points wholly within the state, nevertheless were articles of interstate commerce. The Daniel Ball, 10 Wall. (77 U. S.) 557, 19 L. Ed. 999; Champlain Realty Co. v. Town of Brattleboro, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309, 25 A. L. R. 1195; Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469, 47 S. Ct. 170, 71 L. Ed. 359. These cases, however, did not involve either the making or the enforcing of freight rates, and are not controlling in such a case.

"As we have seen, the Interstate Commerce Commission has tentatively reported that it does not have jurisdiction in this case. Various state and federal courts which have

passed upon this identical case have held the same view.

"Assuredly, if there is any serious doubt as to whether the shipment was interstate, this doubt should be resolved in favor of the intrastate character of the transaction: 'The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power.' Arkansas Railroad Commission et al. v. Chicago, Rock Island & Pacific [fol. 43] R. Co., 274 U. S. 597, 603, 47 S. Ct. 724, 726, 71 L. Ed. 1224.

"The judgment of the lower court is affirmed."

This decision was appealed to the Supreme Court of the United States and certiorari was denied in Chicago, Milwaukee, St. Paul & Pacific Railroad Company, petitioner, v. Campbell River Mills Company, Lt., et al., 285 U. S. 536. Obviously that action was justified by the doctrine of the previously decided Grant Bros. and Pipe Line Cases.

This same doctrine has guided the Interstate Commerce Commission in its consideration of the same character of cases and a recent and outstanding instance of this is found in M. D. Friedman Co. v. Chesapeake & O. Ry. Co., 194 I. C. C. 455. It there appeared that the Southern Railway gathered up scrap iron belonging to it at Princeton and New Albany, Indiana, loaded the same in its own cars, consigned them on straight bills of lading to "Southern Ry. Company care the M. D. Friedman Co. care the American Rolling Mill Co., Ashland, Ky.," the bills of lading bearing the notation "F. O. B. Sou. Ry. tracks Lexington, Ky. Pur. Agt. Sale order 38495 M. D. Friedman's order 1501," and moved them over its own line to Lexington, Ky., its junction with the Chesapeake & Ohio Railway Company. When the cars arrived at Lexington bills of lading were prepared by the Chesapeake & Ohio showing Lexington as the origin of the material and Ashland as the destination, although Friedman had no agent at Lexington. The only interruption of the movement at Lexington was the interchange from the rails of the Southern to those of the Chesapeake & Ohio. The pertinent language of the Commission's de- [fol. 44] cision is found on pp. 456 and 457, as follows:

"The United States Supreme Court held in Mills v. Lehigh Valley R. R., 238 U. S. 473, 478, that a condition precedent to our making a valid reparation award is a finding of 'the relation of the parties as shipper and carrier in interstate commerce.' From the foregoing it will be observed that it is not merely interstate commerce, but an interstate commerce shipper-carrier relation which is required. In other words, *the interstate commerce must be by common carrier*. Hence, in order to grant the relief sought herein it first must be found that there was common carriage from New Albany and Princeton to Ashland" (p. 456). (Italics ours.)

"For the transportation up to Lexington there was but one party, the Southern. That company was merely moving its own scrap material, in its own equipment, and over its own rails to Lexington. It was not doing this for hire. No party other than the Southern had any rights or duties whatever in connection with that transportation. Hence up to Lexington the above billing memorandum was not in any sense a transportation contract, and any implication of a shipper-carrier relation based thereon is misleading and wholly unwarranted" (p. 456).

"Hence there could be no true relation of shipper and carrier until the property was received by the Chesapeake [fol. 45] & Ohio at Lexington; and there was no common-carrier transportation until the property began moving over the rails of the latter carrier. That transportation, although by common carrier, was performed wholly within a single State, Kentucky" (p. 457).

"Even though the common-carrier transportation occurred within a single State, do the facts of noninterruption of movement and nonbreaking of bulk at Lexington in any way alter the jurisdictional situation? In this connection it is apparent that when a railroad corporation sells its discarded company material, which it lawfully may do, the sales contract has no different legal aspects than any other ordinary selling transaction; and the Southern, under the facts of record, was free to move the property to Lexington in any manner it saw fit. It happened to select its own railroad facilities. Those instrumentalities, under usual conditions, are impressed with the attributes of common carriage, but it was held by the Supreme Court in Santa

Fe P. & P. Ry. Co. v. Grant Bros., 228 U. S. 177, that when a railroad company transports its own property it acts not as a common carrier but as a private carrier. Hence, the use in this instance of railroad instrumentalities up to Lexington did not impress upon that traffic anything to change the private character of the transportation. In legal contemplation the situation would have been no different had the scrap material been moved up to Lexington [fol. 46] by private highway truck. An Indiana manufacturer, for instance, might agree to sell goods to an Ashland merchant and also agree, as part of the sales contract, to move the goods from Indiana by truck as far as Lexington, where title would pass, and where the loaded trucks would directly be shipped by rail to Ashland. Under such facts there would neither be interruption of movement nor breaking of bulk at Lexington. Yet it is apparent we would have no jurisdiction over any part of such transportation. Likewise, under the facts of record, the circumstance of continuous carriage from the Indiana origins to Ashland is immaterial so far as the issue now before us is concerned" (p. 457).

This last discussion of the possible movement of the goods from Indiana by truck to Lexington is peculiarly apropos in the case before us, where the movement from Pennsylvania was entirely by the private transportation facilities of the owner of the goods, (i. e., the coal) up to Negley.

All of these decisions lead to the conclusion that the transportation of the raw run-of-mine coal up to Negley, whether it be considered as though river-and-rail transportation from the mines to Negley, as through river-and-rail transportation from Risher to Negley, or as through rail transportation from Smith's Ferry to Negley, was private transportation, involving no dealing with any parties other than the owners of the coal, and of the transportation facilities employed, and was not commerce in any sense of the [fol. 47] word as used in the federal constitution and in the Interstate Commerce Act. Such being the fact, there would seem to be no doubt that there was no commerce involved in the transportation until, after the coal had been washed, cleaned, sized, and prepared by the Coal Company at Negley. It was then sold and loaded into common carrier railroad cars and delivered to a common carrier rail-

road for transportation to Youngstown. That commerce was wholly within the state of Ohio.

Without stopping to discuss the many cases relied upon by the defendants to support the general proposition that the essential nature of the transactions and not the forms of the bills of lading, etc., determines the character of the transaction, we note that they rely upon a number of cases to support the proposition that the particular movement here involved constitutes interstate commerce. The first of these is the case of Coe v. Errol, 116 U. S. 517, from which defendants quote at length. They fail, however, to quote the following language which we find intermediate between what they thus rely upon (p. 527):

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely: that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction and to taxation in the usual [fol. 48] way, *until they have been shipped or entered with a common carrier for transportation to another State* or have been started upon such (*i. e.*, common carrier) transportation in a continuous route or journey. We think that this must be the true rule on the subject." (Italics ours.)

This particular language appears to support the position of the complainant that there is no commerce here involved up to Negley and that the only commerce subject to regulation, therefore, is that from Negley.

Kirmeyer v. Kansas, 236 U. S. 568, is also relied upon by the defendants with the statement that the fact that the traffic there in question moved by horse-drawn wagons from a point near the state line instead of by railroad from a greater distance does not change the applicable rule which makes it interstate commerce. It is true that on the facts in that case the Supreme Court did conclude that the movement in question was commerce and was indeed, interstate commerce. But the facts there are wholly different from those in the case before us. The State of Kansas, including Leavenworth, was dry. Kirmeyer established

what was in effect a beer depot, on the Missouri side of the river, at Stillings, opposite Leavenworth. There he received his beer, and upon receipt of orders by telephone and mail from purchasers in Leavenworth, he would fill such orders by his own delivery wagons which, as a matter of fact, he kept in Leavenworth but moved between Leavenworth and Stillings in his beer business. The Court found, [fol. 49] as it obviously must have found, under the circumstances of trade and dealing in the beer, that Kirmeyer was engaged in interstate commerce, saying (p. 572):

"The foregoing cases and those cited therein we also regard as controlling authority in support of the claim that the business carried on by plaintiff in error within the state of Kansas was interstate commerce.. That the traffic moved by horse-drawn wagons from a point near the state line, instead of by railroad from a greater distance, does not change the applicable rule. Nor did the mere adoption of cumbersome and expensive methods render the business intrastate,—that must be tested by the actual transactions."

In Southern P. Terminal Co. v. Interstate Com. Com., 219 U. S. 498. Here the business in question was export in character, the movement being from inland points in Texas and adjacent states to and through Galveston and over certain terminal facilities there. The whole transportation was by common carriers, and it was specifically pointed out by the court (p. 523) that the Interstate Commerce Act in its regulation of common carrier railroads included, in the term "railroad", terminal facilities of every kind used or necessary in the transportation, including those at Galveston. Obviously, under such circumstances, the transportation being all export in character, there could be and the court held that there was no doubt, that it was commerce subject to regulation under the federal constitution.

Ohio Railroad Commission v. Worthington, 225 U. S. 101, was the case in which there was in issue the character [fol. 50] of the transportation of lake cargo coal from Ohio mines via wholly Ohio routes to Toledo, Ohio, for transshipment there into vessels for movement to destinations beyond the state. The transportation to Toledo was by railroad; the railroads were common carriers; the transportation was definitely consigned beyond the borders of

the state by the application thereto of rates which applied only on lake-cargo coal. The classification of that particular transportation, first, as commerce, and, second, as interstate commerce, was proper, but the case constitutes no authority for the determination by us that the transportation here, which was wholly by private facilities to Negley and in the course of which there was no dealing by the owner of the traffic, who was also the owner of the facilities, with other parties with respect to such traffic, is interstate commerce subject to federal regulation.

Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, was another case where all of the transportation involved was by common carriers. The traffic consisted of lumber which was moved on local bills of lading from one point in Texas to another point in Texas, destined, however, for export to foreign countries; it had been bought by the foreign buyer for the foreign trade; it had been cut to certain dimensions to suit that trade, and was transported to the port of export for further movement in steamships which had in part already been chartered. As the Supreme Court said:

"The lumber was ordered, manufactured, and shipped for export. * * * Nor was there a break, in the sense of the interstate commerce law and the cited cases, in the [fol. 51] continuity of the transportation of the lumber to foreign countries by the delay and its transshipment at Sabine" (p. 130).

This case, therefore, was not in common with the case before us, for the transportation constituted commerce from its very beginning at the point of origin in Texas, and the only question was whether the character of the commerce was intrastate or interstate.

A case almost similar to the Sabine Tram case was Railroad Commission v. Texas & P. R. Co., 229 U. S. 336, where the only question involved was the character of the transportation of certain logs and staves from points in Louisiana to New Orleans for export. The entire rail transportation within the state of Louisiana was by common carriers, but it appeared that the staves and logs were intended by the shippers to be exported to foreign countries and there was no interruption in the transportation to their destina-

tion except what was necessary for transshipment at New Orleans. (pp. 341, 342). Accordingly the Court determined the case by reliance, among others, upon the Sabine Tram case. Like that case, it constitutes no precedent for determination of the issues here presented.

Baer Bros. Mercantile Co. v. Denver & R. G. R. Co., 233 U. S. 479, is another case relied upon by the defendants which is not in point. It involved the character of the transportation from Pueblo, Colorado to Leadville, Colorado, of certain shipments of beer which has been originally billed from St. Louis, Mo., and there received by the [fol. 52] initial rail common carrier "in good order to be delivered to the Baer Bros. Company at Leadville, Colo. via the Denver & Rio Grande." Apparently there was no joint through rate applicable to the transportation from St. Louis to Leadville and the charges were assessed by the combination of the rate from St. Louis to Pueblo and the rate from Pueblo to Leadville. The Court very correctly held that—

"While there was no through rate and no through route, there was in fact a through shipment from St. Louis, Missouri to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts, and by charging local rates and issuing local way-bills, attempting to convert the interstate shipment into intrastate transportation."

The point is that this was commerce by common carriers throughout, from St. Louis to Leadville; in the case before us there was no commerce whatever until the coal was shipped from Negley.

In Pennsylvania R. Co. v. Clark Bros. C. M. Co., 238 U. S. 456, the question was, as shown in the quotation of the defendants in their brief,—"whether commerce is interstate or intrastate." The transportation in question was beyond peradventure of doubt commerce; all that remained for determination was whether it was subject to federal or state regulation, and on this point the court reiterated the well-recognized rule that in determining whether commerce is intrastate or interstate, regard must be had to [fol. 53] its essential character (pp. 465-466); and in determining that the traffic there in question was interstate commerce, the court further said (p. 468):

"The movement thus initiated is an interstate movement, and the facilities required are facilities of interstate commerce."

In the case before us the facilities required up to Negley were not facilities of interstate commerce, but were private facilities throughout.

In B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166, lumber was shipped from the South to Oakley, Ohio. The freight charges to that point were paid and the cars reshipped, without unloading, to Madisonville, Ohio, on local bills of lading and at the local Ohio intrastate rate. The combination of rates to and from Oakley was less than the interstate through rate applicable from the South to Madisonville. From the beginning, Madisonville was at all times the destination of the cars. The simple question there was, whether, under the act to regulate commerce, the intermediate rates, used in combination, could be used to defeat the through interstate rate, and the court held that they could not. But the point for observation here is that the transportation in that case was wholly by railroad common carriers from origin to final destination, that it constituted commerce, and, therefore, was the subject of government regulation.

Atlantic Coast Line R. Co. v. Standard Oil Co., 275 U. S. 257, is cited by the defendants as a case where oil was transported in tank steamers owned and chartered by the sellers from Louisiana and Tampico, Mexico, to seaboard points [fol. 54] in Florida and there pumped into storage tanks and held for future distribution at such times and in such amounts as the business of the oil company required. The court, say the defendants, held that the subsequent movement of the oil from seaboard storage tanks to destinations in Florida, constituted intrastate commerce. A reading of this decision shows that it goes beyond the situation thus described by the defendants. The transportation, the character of which was in question, was not alone transportation of tank cars of oil loaded out of the storage tanks at the seaboard, but transportation also, of tank cars of oil loaded directly from the ship in which the oil reached the port. The question before the court was whether the railroad transportation of all this oil within the state of Florida, which was all common carrier railroad transportation, was interstate or intrastate commerce, and the holding of

the court was that in every instance the movement by tank car in Florida was intrastate, whether loaded from the storage tank or direct from the ship. There, as here, the railroad company attempted to assess, for the purely intrastate Florida transportation, higher rates, which would have been applicable if the commerce were interstate. This the court refused to permit. The court found that upon the arrival of the oil at the ports there was no destination intended and arranged for with the ship carriers at any point in Florida beyond the deliveries from the vessels to the storage tanks and tank cars; that there was no designation of any particular oil for any particular place in Florida beyond the storage receptacles or the tank cars into which [fol. 55] the oil was first delivered by the ships; and that the transportation from Louisiana and Tampico was in tank steamers owned and chartered by the sellers of the oil, whose sales contract provided that they should deliver the same at the Florida ports to the purchaser, who then made the shipments by common carrier railroad in Florida. Under those circumstances the court found that the movement by boat was not commerce under regulation by the Interstate Commerce Commission; it found also with respect to the storage tank operation at the ports that oil was customarily being pumped into the tanks from the steamer and simultaneously being pumped out of the tanks into the tank cars. The court had no hesitation in saying that all this transportation in Florida was intrastate commerce. This case, in our opinion, goes far toward supporting complainant's contention that the coal shipments, here involved, moved from Negley to Youngstown in Ohio intrastate commerce.

Another case relied upon by the defendants is United States v. Erie R. Co., 280 U. S. 98, which concerned shipments of wood pulp from Hoboken, N. J. to Garfield, N. J. This was transportation wholly within the state of New Jersey, but entirely by common carrier railroads. It appeared, however, that the wood pulp was manufactured in a foreign country; that the packages were marked by the foreign manufacturer so as to be identifiable for the ultimate consignee in Garfield; and that there was a continuing intent on the part of the shippers from the time that the shipments of wood pulp left the foreign port that that cer- [fol. 56] tain amount so specified should go to Garfield in

the original packages. All that was left to be done with respect to the intrastate movement was the billing of the same. With respect to this case the defendants say that there is nothing in the opinion of the United States Supreme Court; of the lower federal court (Erie R. Co. v. United States, 32 F. (2d) 613), or of the Interstate Commerce Commission (Hamersley Mfg. Co. v. Erie R. Co., 126 I. C. C. 491; 148 I. C. C. 47) which in any way suggests that the wood pulp was transported to Hoboken, N. J., by a common carrier. We cannot agree with this view. The decisions clearly show that the wood pulp was "shipped"; that foreign bills of lading were made out; that the transporting agency was a steamship company; and that it gave arrival notices. All of these functions are those of a carrier engaged in commerce and dealing with a shipper. But at any rate the facts were such as enabled the Supreme Court to reach the very obvious conclusion that "the rail transportation is in fact a part of foreign commerce" (p. 102). This case is also at variance with the facts before us in the instant case, where the movement of coal to Negley was not a movement in commerce at all, and where the shipments from Negley were not shipments in any original package from the foreign state, but coal, the character of which had been changed at Negley through a manufacturing process to meet the specifications of the purchasers.

Finally, the defendants place particular reliance upon the recent decision of Minnesota v. Blasius, 290 U. S. 1,—a tax case. The gist of that decision is in the concluding [fol. 57] paragraph, as follows (p. 12):

"Here the original shipment was not suspended; it was ended. That shipment was to the South St. Paul stockyards for sale on that market. That transporfation had ceased, and the cattle were sold on that market to Blasius, who became absolute owner and was free to deal with them as he liked. He could sell the cattle within the State or for shipment outside the State. He placed them in pens and cared for them awaiting such disposition as he might see fit to make for his own profit. The tax was assessed on the regular tax day while Blasius thus owned and possessed them. The cattle were not held by him for the purpose of promoting their safe or convenient transit. They were not in transit. Their situs was in Minnesota where they had

come to rest. There was no federal right to immunity from the tax."

Thus the Blasius case was determined solely on the point that the transportation of the cattle in question has ceased, and that the cattle were in fact at rest at a point in the state of Minnesota on the tax date. On this score the defendants now say that because the interruption of the coal in passing through the preparation plant at Brush Run was only temporary and for the convenience of the Coal Company in the course of the transportation movement, the coal did not in fact come to rest at Brush Run. Their brief states that "the record reveals a laborious effort to magnify the nature of the treatment accorded the coal at the [fol. 58] washing plant." The evidence along this line was given by the President of the Coal Company, but counsel for defendants characterized it as "frank" and stated upon hearing that their evidence "would very largely be merely a repetition and cumulative". The defendants, under the circumstances, did not offer their originally intended evidence. Regardless of the time consumed in the preparation of the coal, the fact remains that it would be necessary, in order to confer jurisdiction upon the federal government in the regulation of the rates from Negley, to find that the coal was in fact in commerce from Pennsylvania to Youngstown. As has already been several times pointed out, there was no commerce in the coal either from the mines or from Risher, or from Smith's Ferry, to Negley; the only commerce in the coal was from Negley to Youngstown.

The defendants assert that this Commission's want of jurisdiction in the so-called Ex-Ohio-River Coal Cases shows that the rates on the prepared coal from Negley to Youngstown are beyond our jurisdiction. They assume to base this argument upon the decisions of the Interstate Commerce Commission in Ex-Ohio-River Coal to Ohio Points, 185 I. C. C. 211; 197 I. C. C. 617. Their reliance is thus placed upon the fact that because the rates for common carrier transportation of coal from Ohio River transfer points, via the Wheeling and Lake Erie Railway, to Ohio destinations were regulated by the Interstate Commerce Commission, it necessarily follows that this traffic from Negley to Youngstown is also subject to that regulation. In making this contention the defendants apparently overlook [fol. 59] important particulars which effectively differenti-

ate the two situations. In the first place, in the Ex-Ohio River Coal Cases, there were in issue rates voluntarily filed by the Wheeling and Lake Erie Railway with the Interstate Commerce Commission, which were limited in their application to coal originating at interstate points of origin. The Interstate Commerce Commission disapproved the rates so filed and permitted to be established in lieu thereof other rates which were also limited, "to apply on Ex-River coal originating at mines on the Monongahela, Allegheny and Ohio Rivers", thus definitely tying the application of the rates to coal of interstate origin. In other words, the rates so prescribed are in the nature of proportional rates applicable only to interstate commerce. However, whether rightfully or wrongfully, all parties who participated in the Ex-Ohio-River Coal Cases apparently took the position that the Ex-River rates, there involved, were subject to the jurisdiction of the Federal Commission. The point is that the question of jurisdiction was not determined because it was not raised, and the decision of the Interstate Commission hardly constitutes an authority on that point. It should be borne in mind that boundary line between the state of Ohio on the one hand and the states of Pennsylvania and West Virginia on the other hand, is the North bank (the Ohio side) of the Ohio River and that the river transfer points such as Mingo Junction and Martins Ferry are located in Ohio. In the Ex-River Cases, it was shown that coal is sold at the river mines and is transported by various barge companies, at varying rates, from the mines to the Ohio River transfer points [fol. 60] where it is transferred into railroad cars and forwarded by common carrier railroads to predetermined destinations in Ohio without stoppage in transit for cleaning, washing, sizing or treatment of any kind. On the other hand, as pointed out by defendants, certain companies transport coal from their river mines to the river transfer points in their own private barges. As hereinbefore indicated, the Interstate Commerce Commission was not called upon to differentiate as between the public transportation and the private transportation.

The Lisbon is a party to American Railway Association Tariff Bureau Freight Tariff, Ohio P. U. C. No. 1564, I. C. C. No. 2731, issued by B. T. Jones, Agent, naming car demurrage rules and charges, hereinafter called the "tariff". At the hearing, Mr. Fowler, President of the Lisbon, took the

position that under certain rules contained in the tariff, cars delivered by his company at Negley to the Pittsburgh Coal Company for loading coal at the Coal Company's preparation plant would be exempt from demurrage charges, regardless of the number of days detained before being loaded and shipped. The defendants and interveners contend that Mr. Fowler's interpretation of the tariff rules is incorrect and that such cars would be subject to demurrage charges for any delay beyond the 48 hours' free time allowance as provided in the tariff. We have examined, very carefully, the tariff and the rules embodied therein and are constrained to agree with the defendants and interveners. The same demurrage rules would apply whether the traffic is intrastate or interstate. The question of demurrage, however, can have no bearing upon the disposition of this [fol. 61] case. Therefore, any further discussion on the subject would be unprofitable.

We find that there was no dealing in, or with respect to, this coal in the course of its transportation from the mine in Pennsylvania, from Risher, Pa., or from Smith's Ferry, Pa., to Negley, Ohio; that the coal throughout the movement from the mine, from Risher, Pa., or from Smith's Ferry, Pa., to Negley remained in the ownership, possession and control of the Pittsburgh Coal Company which was also the owner of all the facilities employed in that movement; that there was no transportation of the coal in any original package to Negley; that there was no through and continuous transportation from the mine to Negley; that there was no commerce in the coal in the course of its transportation from the mine to Negley.

We further find that the transportation of the four carloads of coal, herein involved, from Negley to Youngstown, was transportation in Ohio intrastate commerce and subject to our jurisdiction.

We also conclude and find that the defendants have failed, omitted and neglected, and that they threaten to continue to fail, omit and neglect to transfer, switch and deliver the said four carloads of coal at the switching rates or charges applicable to Ohio intrastate coal traffic.

We further conclude and find that the complainant, a common carrier, in possession of the said four carloads of coal, is obligated to deliver the same to the defendants; that complainant is entitled to maintain this suit; that the law-

ful obligation rests upon defendants to receive said four carloads of coal from the complainant and to transfer, [fol. 62] switch and deliver the same to the consignees in Youngstown, Ohio, at the applicable Ohio intrastate switching rates or charges in effect at the time the shipments were first offered to them by the Youngstown and Suburban Railway Company.

And we further conclude and find that the lawful obligation rests upon defendants to receive, transfer, switch and deliver all other carloads of bituminous coal, consigned to consignees with private sidings on the line of the Erie Railroad in the city of Youngstown, Ohio, (at the Ohio intrastate switching rates or charges applicable to such traffic and contemporaneously in effect) that may be transported in the future, in Ohio intrastate commerce, from Negley, Ohio, to Youngstown, Ohio, via the Pittsburgh, Lisbon and Western Railroad in connection with the Youngstown and Suburban Railway.

An appropriate order will be entered.

[fol. 63] Order

At a General Session of The Public Utilities Commission of Ohio, Held at its Office in the City of Columbus, Ohio, on the 26th day of March, A. D. 1935

No. 9113

THE YOUNGSTOWN AND SUBURBAN RAILWAY COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY and ERIE RAILROAD COMPANY

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above named defendants, according as they participate in the transportation, be, and they

are hereby notified and required to cease and desist, on or before April 10, 1935, from failing, omitting, neglecting or refusing, without unreasonable delay, to transfer, switch and deliver to the named consignees thereof in Youngstown, Ohio, the four carloads of bituminous coal, as described in [fol. 64] said report (at the Ohio intrastate rates or charges applicable for such switching service and in effect at the time said shipments were offered to the defendants in Youngstown by the Youngstown and Suburban Railway Company) and thereafter to abstain from failing, omitting, neglecting or refusing, without unreasonable delay, to transfer, switch and deliver any other carloads of bituminous coal, at the Ohio intrastate rates or charges applicable for the switching of such traffic in Youngstown and contemporaneously in effect, that may be shipped from Negley, Ohio, and road-hauled into Youngstown by the Youngstown and Suburban Railway for delivery to consignees with private sidings on the line of the Erie Railroad in the city of Youngstown, under similar circumstances and conditions with respect to the four carloads of bituminous coal, herein directly involved, as described in said report;

And it is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required, on or before April 10, 1935, to receive from the Youngstown and Suburban Railway and to transfer, switch and deliver the said four carloads of bituminous coal to the consignees in Youngstown at the Ohio intrastate switching rates or charges in effect at the time the shipments were offered to said defendants in Youngstown by the Youngstown and Suburban Railway, and in the future to accept, transfer, switch and deliver any other carloads of bituminous coal, shipped from Negley, Ohio, and road-hauled into Youngstown by the Youngstown and Suburban Railway for delivery to consignees, with private sidings, on the Erie Railroad in the city of Youngs- [fol. 65] town, under like circumstances and conditions with respect to the four carloads of bituminous coal herein directly involved, at the Ohio intrastate switching rates or charges applicable to such switching service in Youngstown and contemporaneously in effect.

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; Charles F. Schaber, R. D. Williams, Commissioners. (Seal.)

A true copy: C. H. Knisley, Secretary.

[fol. 66] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRECIPE FOR SUBPOENA—Filed April 15, 1935

To the Clerk of this Court:

Please issue a subpoena in said cause to said defendants and to each of them, to-wit: The Public Utilities Commission of Ohio, Eldon J. Hopple, Charles F. Schaber and Roy D. Williams as members of said Commission and John W. Bricker, as Attorney General of the State of Ohio, directed to The United States Marshal of said District to execute and return, endorsed and made returnable in accordance with the law and equity rules of this court.

Dated this 15th day of April, 1935.

(Sgd.) Henderson, Burr, Randall & Porter, Solicitors for Complainants.

[fol. 67] IN UNITED STATES DISTRICT COURT

SUBPOENA AND RETURN—Filed April 29, 1935

The President of the United States of America, to the Public Utilities Commission of Ohio, Eldon J. Hopple, Charles F. Schaber and Roy D. Williams, as Members of said Commission and John W. Bricker, as Attorney General of the State of Ohio, Greetings:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's Office of the United States District Court for the Southern District of Ohio at Columbus, Ohio, to answer unto the bill of complaint of The Pennsylvania Railroad Company and The Erie Railroad Company in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Benson W. Hough, United States District Judge at Columbus, Ohio this 15th day of April, A. D. 1935.

Harry F. Rabe, Clerk, by H. E. Parker, deputy clerk.

Memorandum

The defendants in this case are required to file their answers or other defenses in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro fesso.

[fols. 68 & 69] Return on Service of Writ

United States of America,
Southern District of Ohio, ss:

I hereby certify and return, that on the 16th day of April, 1935, I received the within writ and in pursuance of its command I served the within named Public Utilities Commission of Ohio by serving Eldon J. Hopple and then Eldon J. Hopple personally, Charles F. Schaber, personally, Roy D. Williams, personally and John W. Bricker, Attorney General of Ohio personally, a true copy of this writ with all the endorsements thereon.

R. Kenneth Kerr, United States Marshal, by Veley E. Main, Deputy United States Marshal.

Marshal fees:	
1 Travel	.06
5 copies (3 fols.),1.50	1.50
5 Service	10.00
	11.56

[File endorsement omitted.]

[fol. 70] In United States District Court

[Title omitted]

Answer of Defendants—Filed May 3, 1935

To the Honorable, the Judges of the District Court of the United States, for the Southern District of Ohio, Eastern Division:

Now comes The Public Utilities Commission of Ohio and John W. Bricker, attorney general of the state of

Ohio, and file their answer in the above styled and numbered cause and for their answer to so much of the bill in the above entitled cause as these defendants are advised it is necessary for them to make answer unto say:

For a first answer to the bill of complaint, defendants aver that it appears from the face of the bill, that the [fol. 71] matters and things involved are solely Ohio intrastate commerce; that no interstate commerce is involved; that it further appears from the report of The Public Utilities Commission of Ohio, appended to and made a part of the bill of complaint, that the controversy involves only Ohio intrastate commerce and not at all interstate commerce; and that accordingly this court is without primary jurisdiction in the premises.

Wherefore, defendants pray that the bill of complaint be dismissed at the costs of the plaintiffs.

Further answering defendants say:

1. Defendants admit the allegations of fact stated in Paragraph 1 of the bill of complaint, except that defendants deny the allegation that the Pennsylvania Railroad Company has a large investment in and maintains extensive switching and terminal facilities in said city of Youngstown for receiving from and delivering to connecting lines, and the delivery to industries on its own rails, of bituminous coal and other commodities handled in interstate commerce.

Defendants aver that said Pennsylvania Railroad Company has an investment in and maintains switching and terminal facilities in said city of Youngstown for receiving from and delivering to connecting lines, and the delivery to industries on its own rails, of bituminous coal and other commodities handled in both interstate and intrastate commerce, and not exclusively in interstate commerce as alleged.

2. Defendants admit the allegations of fact stated in Paragraph 2 of the bill of complaint, except that defend- [fol. 72] ants deny the allegation that said Erie Railroad Company has a large investment in and maintains extensive switching and terminal facilities in said city of Youngstown for receiving from and delivering to connecting lines, and the delivery to industries on its own rails,

of bituminous coal and other commodities transported and handled in interstate commerce.

Defendants aver that said Erie Railroad Company has an investment in and maintains switching and terminal facilities in said city of Youngstown for receiving from and delivering to connecting lines, and the delivery to industries on its own rails of bituminous coal and other commodities transported and handled in both interstate and intrastate commerce, and not exclusively in interstate commerce as alleged.

3. Defendants admit the allegations of fact stated in Paragraph 3 of the bill of complaint.

4. Defendants admit the allegations of fact stated in Paragraph 4 of the bill of complaint.

5. Defendants admit the allegations of fact stated in Paragraph 5 of the bill of complaint, except that defendants deny any inference contained in said allegation that the Pittsburg Coal Company maintains and operates barges, tow-boats and other facilities for the transportation of coal as a common carrier from its mines in the state of Pennsylvania to points on the Monongahela and Ohio rivers and Little Beaver creek.

Defendants aver that the Pittsburg Coal Company maintains and operates barges, tow-boats and other facilities for the transportation of its own coal by water from its [fol. 73] own mines in the state of Pennsylvania to points on the Monongahela and Ohio rivers and to its own river-to-rail transfer facilities on the Little Beaver creek.

6. Defendants admit the allegations of fact stated in Paragraph 6 of the bill of complaint except that defendants deny that the Pittsburg, Lisbon & Western Railroad Company is engaged in the transportation of bituminous coal in interstate commerce over its lines from a point near Negley in the state of Ohio to Signal in said state as alleged.

Defendants aver on the contrary that said Pittsburg, Lisbon & Western Railroad Company is engaged, and in the transportation of the four car loads of bituminous coal here in question was engaged, in the transportation of bituminous coal from a point near Negley in the state of Ohio to Signal in said state in intrastate commerce.

7. Defendants admit the allegations of fact stated in Paragraph 7 of the bill of complaint.

Defendants aver that the Youngstown and Suburban Railway Company is chartered also to operate by steam.

8. Defendants admit the allegations of fact stated in Paragraph 8 of the bill of complaint.

Defendants aver that by order of The Public Utilities Commission of Ohio, dated April 18, 1935, the effective date of that commission's original order of March 26, 1935, in its Proceeding No. 9113 was postponed to and fixed as June 25, 1935.

9. Defendants admit that the order complained of in the bill of complaint was not made upon the petition of any party hereto.

[fol. 74] Defendants deny the other allegations of fact stated in Paragraph 9 of the bill of complaint and defendants further aver that said Proceedings No. 9113 before The Public Utilities Commission of Ohio, and the purpose of said proceedings were and are as described in the report of said commission under date of March 26, 1935, as follows:

"The Youngstown and Suburban Railway Company (hereinafter called the 'Y. & S.'), an interurban electric railroad, engaged in both intrastate and interstate commerce, (chartered also to operate by steam) here seeks an order which will require the Pennsylvania Railroad Company (hereinafter called the 'P. R. R.') as an intermediate line, and the Erie Railroad Company (hereinafter called the 'Erie') as a delivering line, to switch and deliver to consignees in Youngstown, Ohio, at rates and charges applicable on Ohio intrastate coal traffic, four car loads of bituminous coal brought into Youngstown by the Y. & S. as a road-haul carrier.

"The particular coal in question was shipped, and other coal is expected hereafter to be shipped, from Negley, Ohio, a local point on the line of The Pittsburg, Lisbon & Western Railroad Company (hereinafter called the 'Lisbon'), and was routed and transported via that line to Signal, Ohio, thence via the Y. & S. to its point of interchange with the P. R. R. in Youngstown, for delivery to the latter and by it to the Erie, for delivery by the Erie to the consignees."

10. Defendants deny the allegations of fact stated in Paragraph 10 of the bill of complaint in the manner and form in which the same are stated; and defendants specifically deny that the coal in question was moved in a [fol. 75] continuous journey down the Monongahela and Ohio rivers and the Little Beaver creek to Smith's Ferry in the state of Pennsylvania, and that it was there loaded in bulk into railroad cars and transported through the coal company's cleaning plant at Brush Run in the state of Ohio, thence to Youngstown, Ohio, all by the water-and-rail transportation facilities of the said coal company and the lines of the Lisbon and Suburban.

11. Defendants admit the allegations of fact stated in Paragraph 11 of the bill of complaint, except that defendants deny that the movement of the said four cars of coal is interstate commerce and deny also that interstate rates are applicable thereto.

12. Defendants deny the allegations of fact stated in Paragraph 12 of the bill of complaint.

13. Defendants deny the allegations of fact stated in Paragraph 13 of the bill of complaint.

14. Defendants deny the allegations of fact stated in Paragraph 14 of the bill of complaint.

15. Defendants deny the allegations of fact stated in Paragraph 15 of the bill of complaint.

16. Defendants admit the allegations of fact stated in Paragraph 16 of the bill of complaint; but defendants further aver that no such penalties can be incurred prior to June 25, 1935, to which date the effective date of the order of the commission of March 26, 1935, in its said Proceeding No. 9113 has been extended.

17. Defendants deny the allegations of fact stated in Paragraph 17 of the bill of complaint; and defendants aver on the contrary that the findings and the order of [fol. 76] the commission in its report in its said Proceeding No. 9113 are supported by undisputed and uncontradicted evidence contained in the record of the said proceeding.

18. Defendants deny the allegations of fact stated in Paragraph 18 of the bill of complaint.

19. Defendants deny the allegations of fact stated in Paragraph 19 of the bill of complaint.

20. Defendants deny the allegations of fact stated in Paragraph 20 of the bill of complaint.

21. Defendants deny the allegations of fact stated in Paragraph 21 of the bill of complaint.

22. Defendants deny the allegations of fact stated in Paragraph 22 of the bill of complaint.

23. Defendants deny the allegations of fact stated in Paragraph 23 of the bill of complaint.

Further answering, defendants deny each and every allegation of fact stated in the bill of complaint, except in so far as the same are herein expressly admitted.

Wherefore, having fully answered the bill of complaint, defendants pray that the application for a temporary restraining order and for an interlocutory injunction be denied; and that upon final consideration the bill of complaint be dismissed at plaintiffs' costs and that these de-
[fol. 77] fendants may go hence without day and judgment for their costs.

The Public Utilities Commission of Ohio, and John W. Bricker, Attorney General of the State of Ohio, by John W. Bricker, Attorney General of Ohio, Donald C. Power, Attorney for The Public Utilities Commission of Ohio, Solicitors for Defendants. August G. Gutheim, of Counsel.

Duly sworn to by E. J. Hopples. Jurat omitted in printing.

[fol. 78] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION BY PLAINTIFFS FOR INTERLOCUTORY INJUNCTION —Filed May 11, 1935

To the Honorable Xen. Hicks, Benson W. Hough and Robert R. Nevin, Judges of Said Court:

Now come The Pennsylvania Railroad Company, a corporation, and The Erie Railroad Company, a corporation, plaintiffs herein, and respectfully represent to the Court:

1. That the order of the Public Utilities Commission of Ohio, herein complained of, requires these plaintiffs to deliver interstate traffic in switching service at Youngstown, Ohio, upon rates measureably less than those lawfully applicable upon said traffic in accordance with plaintiffs' tariffs duly and lawfully on file with the Interstate Commerce Commission.

2. That the rates upon which said order requires said traffic to be delivered are less than remunerative rates, and because said order requires the delivery at said rates of the particular traffic here in question, together with all future traffic under like circumstances and conditions, these plaintiffs will be irreparably injured unless said order be enjoined by interlocutory order prior to the effective date thereof in that these plaintiffs will have no means of later collecting the balance of the charges outstanding for such service except by means of a multiplicity of new and sepa- [fol. 79] rate suits.

3. That if said order is permitted to become effective, these plaintiffs will be irreparably injured in that their particular right of action herein and under the Constitution and statutes of the United States, referred to in the petition heretofore filed, will have become moot, and these plaintiffs will have been deprived of their fair opportunity for submitting the question of the lawfulness and the constitutionality of the order complained of to the determination of a judicial tribunal upon its own independent judgment as to both law and fact for the reason that if the order be once enforced the issues herein will have become moot, as aforesaid.

4. That because of the fact that the rates imposed by the order herein complained of are less than the rates applicable on interstate commerce and are unremunerative, and, in fact, less than the cost of the service furnished, these plaintiffs will be irreparably damaged if said order is permitted to become effective by reason of the fact that it is to apply upon all future traffic "under like circumstances and conditions with respect to the four carloads of bituminous coal herein directly involved."

Wherefore, these plaintiffs pray that this Honorable Court issue an interlocutory injunction staying the opera-

tion of said order and the enforcement thereof by the Public Utilities Commission of Ohio and John W. Bricker, Attorney General of the State of Ohio, and all persons acting for and on their behalf, or on their authority, until the further order of this Honorable Court.

(S.) Guernsey Orcutt, (S.) Willis T. Pierson, (S.) John J. Fitzpatrick, (S.) Leo P. Day, Solicitors for Plaintiffs.

[fol. 80] *Duly sworn to by H. C. Oliver. Jurat omitted in printing.*

[fol. 81] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR INTERLOCUTORY INJUNCTION—Filed May 11, 1935

Now comes plaintiffs, and moves the Court for an Interlocutory injunction as prayed for in the petition heretofore filed herein, upon the grounds set forth in said petition.

Guernsey Orcutt, William T. Pierson, John J. Fitspatrick, Leo P. Day, Solicitors for Plaintiffs.

[File endorsement omitted.]

[fol. 82] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF HEARING—Filed May 11, 1935

To the Honorable Martin L. Davey, Governor of the State of Ohio; Honorable John W. Bricker, Attorney General of the State of Ohio; The Public Utilities Commission of Ohio:

You will please take notice that hearing of the application of the complainant in the above entitled case for an interlocutory injunction as prayed for in the petition will be heard in the United States District Court, Southern District of Ohio, Eastern Division, Federal Building, in the City of

Columbus, Ohio, Saturday May 11, 1935, at 9:30 o'clock A. M.

Henderson, Burr, Randall & Porter, W. T. Pierson, John J. Fitzgerald, Leo P. Day & Guernsey Orcutt, Solicitors for Complainants.

Dated at Columbus, Ohio, May 4, 1935.

Receipt

Service of the foregoing notice upon the undersigned this 4th day of May, 1935, is hereby acknowledged.

Martin L. Davey, Governor of the State of Ohio. John W. Bricker, Attorney General of the State of Ohio. The Public Utilities Commission of Ohio, E. J. Hopple, Chairman.

[File endorsement omitted.]

[fol. 83] In United States District Court

[Title omitted]

Motion of the Baltimore & Ohio Railroad Company, the Lake Erie & Eastern Railroad Company, the Pittsburg & Lake Erie Railroad Company and the New York Central Railroad Company for Leave to Intervene—Filed Dec. 11, 1935

Now comes the Baltimore & Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburg & Lake Erie Railroad Company and The New York Central Railroad Company, by their counsel and moves this Honorable Court for leave to intervene in and be made parties in the above entitled cause, and represents to the Court that they have an interest in said proceeding as follows, to-wit:

I

That the petition in the above entitled cause seeks to enjoin, set aside, suspend and annul an order of the Public Utilities Commission of Ohio and is instituted under an Act of Congress, (approved June 18, 1910, c. 309, Sec. 17, 36 Stat. 557; March 3, 1911, c. 231, Sec. 266, 36 Stat. 1162;

March 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938, and May 14, 1934, c. 283, Sec. 2, 48 Stat. 775).

[fols. 84 & 85] II

That said petition seeks to enjoin, set aside and annul an order of The Public Utilities Commission of Ohio entered inter alia in O. P. U. C. Docket No. 9113; that said Baltimore & Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburg & Lake Erie Railroad Company and The New York Central Railroad Company were interveners before the Public Utilities Commission of Ohio in said Docket No. 9113, that the order entered in said Docket would require the movement of coal originating at mines in the State of Pennsylvania and handled in interstate commerce to Youngstown, Ohio, at intrastate rates under tariffs on file with the Public Utilities Commission of Ohio, in lieu of the regularly published interstate charges applicable to such traffic under tariffs on file with the Interstate Commerce Commission, and that the said order of the Public Utilities Commission and its requirements materially affect the interest of your petitioners.

Wherefore, the said Baltimore & Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburg & Lake Erie Railroad Company and The New York Central Railroad Company pray the court to make and cause to be entered herein an order making said Baltimore & Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburg & Lake Erie Railroad Company and The New York Central Railroad Company, interveners herein.

(Signed) C. T. Lewis, Jr., (Signed) John J. Fitzpatrick, (Signed) Leo P. Day, Attorneys for Petitioners.

[fols. 86 & 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING PETITION OF INTERVENTION—Filed Dec. 11, 1935

On application duly made in open court, all of the parties being present and represented by their counsel, it is ordered that leave be and same is hereby granted to The Baltimore & Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburg & Lake Erie Railroad Company and The New York Central Railroad Company, to file their petition of intervention heretofore tendered and to be, and they hereby are, made parties to the cause.

Done this 11th day of December, 1935

(Signed) Florence E. Allen, United States Circuit Judge. (Signed) R. R. Nevin, United States District Judge.

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF INTERVENTION OF B. & O. R. R. CO. ET AL.—Filed Dec. 11, 1935

[fol. 89] Come now your petitioners, The Baltimore & Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburg & Lake Erie Railroad Company, and The New York Central Railroad Company, and respectfully represent that they have an interest in the matters in controversy in the above entitled proceeding and desire to intervene in and become a party to said proceeding, and for grounds of the proposed intervention say:

I

That your petitioners are corporations engaged as common carriers in the carriage of property by rail and by rail and water in both intrastate and interstate commerce within the State of Ohio and between points in Ohio, on the one hand, and between points in other states, on the other;

II

That in the proceeding before The Public Utilities Commission of Ohio known as Docket No. 9113, The Youngstown & Suburban Railway Company v. The Pennsylvania Railroad Company and The Erie Railroad Company, your peti-

tioners intervened therein and through your petitioners' counsel entered their appearance therein, actively participated in the aforesaid proceeding, offered evidence and submitted briefs.

III

That by their bill the complain-ts herein, the Pennsylvania Railroad Company and Erie Railroad Company, bring this suit in equity against The Public Utilities Commission of Ohio and The Attorney General of Ohio under an Act of Congress, (approved June 18, 1910, c.309, Sec. 17, 36 Stat. 557; Mar. 3, 1911, c.231, Sec. 266, 36 Stat. 1162; March 4, 1913, c.160, 37 Stat. 1013; February 13, 1925, c.229, Sec. 1, 43 Stat. 938, and May 14, 1934, c.283, Sec. 2, 48 Stat. 775), to enjoin, set aside and annul a certain order made by The Public Utilities Commission of Ohio in the certain proceeding known as No. 9113, The Youngstown & Suburban Rail- [fol. 90] way Company v. The Pennsylvania Railroad Company and Erie Railroad Company, bearing date of March 26, 1935, and to enjoin the enforcement of said order.

IV

Your petitioners respectfully represent that the order of the said Public Utilities Commission of Ohio in the said Docket No. 9113, is of great importance to them, and as they have an interest involved herein, respectfully pray:

That leave be granted them to intervene in, and be treated as parties to, this suit with right to have notice of, and to appear at the taking of evidence, to produce, examine, and cross examine witnesses, and to be heard in person or by counsel upon brief and in oral argument.

That this Honorable Court make such other order or orders in the premises as to it may seem meet and appropriate.

Chicago, Illinois, May 10, 1935.

The Baltimore & Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburg & Lake Erie Railroad Company, The New York Central Railroad Company, By (Signed) C. T. Lewis, Jr., John J. Fitzpatrick, Leo P. Day, Attorneys for Petitioners, 525 Lasalle St. Station, Chicago, Ill.

[fols. 91-93] *Duly sworn to by Leo P. Day. Jurat omitted in printing.*

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PITTSBURGH COAL COMPANY FOR LEAVE TO INTERVENE—Filed Dec. 11, 1935

To the Honorable, the Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Pittsburgh Coal Company, your petitioner, respectfully represents:

1

That your petitioner, Pittsburgh Coal Company, is a corporation, duly organized and existing under the laws [fol. 95] of the State of Pennsylvania, with the charter power, inter alia, to engage in the mining, production and sale of coal and the transportation thereof to market; that its principal office and place of business are in the City of Pittsburgh, Pennsylvania; and that it is lawfully registered to do business in the State of Ohio.

2

That the above entitled cause was commenced in your Honorable Court on April 15th, 1935, upon the filing of the petition of The Pennsylvania Railroad Company and The Erie Railroad Company, Complainants, for the purpose of setting aside and abrogating a certain order of the Public Utilities Commission of Ohio, entered on March 26, 1935, the effective date of which has been duly postponed by said Commission to June 25, 1935, and for the purpose of restraining said Commission and the Attorney General of the State of Ohio from enforcing the terms of said order, all as fully set forth in the said petition and the prayer for relief thereof.

3

That said order, sought to be set aside and enjoined by the Complainants in the above entitled cause, was entered, as aforesaid, by said Commission in a proceeding instituted before it at No. 9113, wherein the Youngstown & Suburban Railway Company, an Ohio corporation, was complainant

and The Pennsylvania Railroad Company and Erie Railroad Company were respondents; that in said proceeding the Youngstown & Suburban Railway Company complained [fol. 96] of the failure and refusal of respondents therein to accord switching service in the City of Youngstown, Ohio, at the lawfully published Ohio Intrastate switching rates, for four carloads of bituminous coal; that said four carloads of bituminous coal were shipped from Negley, Ohio, a local point on the line of the Pittsburgh, Lisbon and Western Railroad Company and routed over and transported by that line to Signal, Ohio, from which point said cars were transported by the Youngstown & Suburban Railway Company to its point of interchange with the Pennsylvania Railroad Company in the City of Youngstown, for delivery by the latter company to the Erie Railroad Company and by the Erie Railroad Company to consignees in the City of Youngstown; that said transportation was wholly within the State of Ohio; that respondents therein had refused to receive said cars as Ohio intrastate commerce; that the Youngstown & Suburban Railway Company tendered to the respondents the amount of their switching charges at the rates applicable to Ohio intrastate commerce; that despite said tender the respondent carriers continued their refusal to switch the four carloads of coal; and that after full hearing the Public Utilities Commission of Ohio entered its said order, as aforesaid, requiring the Pennsylvania Railroad Company and the Erie Railroad Company to transfer, switch and deliver said four carloads of bituminous coal to the named consignees thereof in the City of Youngstown, Ohio, at the Ohio intrastate rates applicable to such switching service and likewise requiring them in the future to perform such service at the applicable Ohio [fol. 97] intrastate rates for any other carloads of bituminous coal shipped under similar circumstances from Negley, Ohio, and road-hauled into the City of Youngstown by the Youngstown & Suburban Railway Company for delivery to consignees on the line of the Erie Railroad Company in said city, all as fully set forth in said order attached to and made part of the petition of Complainants in this proceeding.

4

That your petitioner, Pittsburgh Coal Company, has a substantial interest in the subject matter of the litigation in

the above entitled cause, before your Honorable Court, by reason of the following facts:

(a) Your petitioner was the shipper of the said four carloads of bituminous coal so offered for shipment at Negley, Ohio; and your petitioner will in the future ship many carloads of coal from Negley, Ohio, to points of destination in the same State. As such shipper your petitioner is primarily liable for the charges for the common carrier transportation, transfer and delivery of coal shipped by it.

(b) Your petitioner is the owner of a number of coal mines located upon and accessible to the Monongahela River in the State of Pennsylvania, which are called "river mines" because of their location and because their output is largely transported by barges over the river highways in any movement to market. These river mines open into [fol. 98] many thousands of acres of coal land owned by your petitioner.

Your petitioner owns and operates privately at Brush Run, about two miles from Negley, Ohio, a central preparation and processing plant for the cleaning, sizing and preparation for market of coal from its river mines. At said preparation plant, the river coal of your petitioner is prepared for market by a series of processes whereby the physical and chemical character of the raw coal is materially changed. Mineral impurities are removed and the refined product is sized and mixed into any one or more of twenty-five different sizes.

Appurtenant to its said coal preparation plant, your petitioner owns and operates privately on its own lands, its own track facilities connecting said plant with a private unloading dock which petitioner owns and operates privately at Smith's Ferry, Pennsylvania, on the Little Beaver River near its point of confluence with the Ohio River. Said coal preparation plant is connected with the Pittsburgh, Lisbon & Western Railroad Company by means of a switch track which is likewise privately owned and operated by your petitioner. In its said coal preparation plant and appurtenant facilities, your petitioner has an investment exceeding $1,500,000.00.

Your petitioner also owns and operates its own river fleets and barges on the Ohio and Monongahela Rivers for [fol. 99] the private transportation of its own coal.

By means of the before mentioned private facilities, your petitioner is enabled to move its own coal from its said river mines on the Monongahela River by its own barges and steamboats to its private unloading dock at Smith's Ferry, Pennsylvania. At the dock, coal is removed from the barges by special equipment (designed to minimize breakage) and loaded into petitioner's private coal cars. The coal is then transported over its own private track facilities to its preparation plant near Negley, Ohio, where it is processed and sized for market. After the processing treatment, the prepared coal is then sold for the first time and loaded into railroad cars and delivered by your petitioner's own engine to the interchange track of the Pittsburgh, Lisbon & Western Railroad Company for delivery to market.

(c) The four carloads of bituminous coal involved were prepared, processed and sized from coal mined by your petitioner from its before mentioned river mines located on the Monongahela River in the State of Pennsylvania.

The raw run of mine coal was moved by your petitioner over its private facilities by land and water to its coal preparation plant near Negley, Ohio; and was prepared for mar-
[fol. 100] ket by the before mentioned preparation and sizing processes at said plant.

(d) In the movement of its raw coal to its Brush Run preparation plant, where the said four carloads of coal were prepared for market and where in the future other coal of your petitioner will be similarly prepared for market, your petitioner is not engaged in commerce or in interstate commerce. Your petitioner is neither a common carrier in law nor in fact; and no common carrier use is in any way made of the plant track facilities. The use of the facilities by which your petitioner moves its raw coal to its preparation plant at Negley, Ohio, as aforesaid, involves neither a common carrier transportation nor a transportation in interstate commerce.

5

That by reason of the foregoing facts your petitioner has a vital interest in defeating the attempt of the Complainants herein to impress upon these private facilities a character which in law they do not have, and which would result

in increased and exorbitant cost to your petitioner in marketing its prepared coal products. Whether the common carrier services performed by the Complainants herein in carrying prepared coal after it is processed at your petitioner's coal preparation plant at Negley, Ohio, to points of destination in the State of Ohio, are intrastate in character or interstate in character as Complainants allege, is a mat- [fol. 101] ter of vital importance to your petitioner. The charges applicable to such services when performed for interstate traffic are substantially higher than the charges applicable to the same services when rendered in Ohio intrastate commerce. If your petitioner is forced to pay for the intrastate common carrier services here involved at rates applicable to interstate commerce, the effect will be to impose an unwarranted penalty or charge upon a purely private enterprise and to deprive your petitioner of its constitutional rights in violation of the Fifth Amendment of the Constitution of the United States.

If the non-common carrier movement of its own raw product by your petitioner over its own private facilities for preparation for market is impressed with the character of interstate commerce, and if the Complainants herein are permitted to charge interstate rates for their subsequent common carrier services rendered wholly within the State of Ohio, the result will be that Ohio industries and the Ohio consuming public will be unable to get high quality coal at reasonable prices. Further, your petitioner will be unable freely to dispose of its property in a highly competitive market if it is subjected to the exorbitant transportation and switching charges which Complainants seek to exact.

6

That your petitioner, therefore, desires to intervene in the above entitled cause as a party defendant, to defend by its solicitors, and to file its proposed Answer, a copy of [fols. 102 & 103] which is filed herewith and made a part hereof.

Wherefore, your petitioner prays that your Honorable Court make an order granting it leave to intervene therein as a party defendant, and to answer the petition of the Complainants therein and any amended or supplemental

petitions which complainants may file, and to file such further pleadings and to take such further action in said cause as may be proper or necessary to protect its interest and rights in the subject matter thereof.

Don Rose, Charles E. Blanchard, Solicitors for Petitioners, Pittsburgh Coal Company. Of Counsel: Howard M. Swartz, John Evans Rose, Rose & Eichenauer, 707 Oliver Building, Pittsburgh, Pa. Blanchard, Touvelle & Nida, 42 E. Gay Street, Columbus, Ohio.

Dated May 11th, 1935.

[fol. 104] *Duly sworn to by J. D. A. Morrow. Jurat omitted in printing.*

[fols. 105 & 106] In United States District Court

[Title omitted]

Order Allowing Petition of Intervention—Filed Dec. 11, 1935

This cause came on to be heard upon the motion of the Pittsburgh Coal Company to be permitted to intervene as party defendant; and it appearing from the record, briefs and argumen of counsel that the said Pittsburgh Coal Company has a substantial interest in the subject matter of the litigation in the above entitled cause, it is hereby ordered that said motion be, and it hereby is sustained.

(Signed) Florence E. Allen, United States Circuit Judge. (Signed) Robert R. Nevin, United States District Judge.

[fol. 107] In United States District Court

[Title omitted]

Answer of Pittsburgh Coal Company, Intervening Defendant—Filed Dec. 11, 1935

To the Honorable, the Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Now comes Pittsburgh Coal Company, Intervening Defendant in the above entitled cause, and for its Answer to

the Petition filed by the Complainants in the above entitled cause, says:

First. Defendant hereby adopts as its Answer to said Petition the Answer made and filed for and on behalf of the Defendants, Public Utilities Commission of Ohio, and John W. Bricker, Attorney General of the State of Ohio.

Second. For further and additional answer to the allegations of fact contained in paragraph 5 of the Petition, [fol. 108] Defendant admits that the Pittsburgh Coal Company is a corporation organized and existing under the laws of the State of Pennsylvania; that it is duly authorized to do business in the State of Ohio; that it has extensive bituminous coal mining properties in the State of Pennsylvania and elsewhere and is engaged in the mining, production and sale of bituminous coal; that it maintains and operates barges, tow boats and other private facilities on the Monongahela, Ohio, and Little Beaver Rivers for the movement of its own coal by water from its own mines and harbors located on the Monongahela River to various points on the Monongahela, Ohio and Little Beaver rivers; that it owns and operates a private harbor at Risher, Pennsylvania on the Monongahela River; that it owns and operates its own private unloading dock on the Little Beaver River near Smith's Ferry, Pennsylvania; that it owns and operates a private track facility appurtenant to and connecting its coal preparation plant which is located on Brush Run, Ohio, near Negley, Ohio, with its said unloading dock on the Little Beaver River; that the unloading dock at Smith's Ferry, Pennsylvania includes facilities whereby its coal can be unloaded from its river barges and transferred to its private coal cars on its said track facility; that its owns in fee simple the land upon which this private track facility is located; that at Brush Run, Ohio, near Negley, Ohio, it maintains a plant for the washing, cleaning, sizing and preparing of its own coal for market; and that said coal preparation plant is physically connected with the line of the Pittsburgh, Lisbon & Western Railroad Company by means of a private switch track owned and operated by the Pittsburgh Coal Company.

[fol. 109] Defendant denies the inference that it is engaged in the movement of coal other than its own coal by its river barges to its unloading dock at Smith's Ferry, Penn-

sylvania; denies that it is operating a common carrier railroad from its unloading dock to its coal preparation and processing plant at Brush Run; denies that it is engaged in the common carriage of coal from its mines to its unloading dock at Smith's Ferry, Pennsylvania; denies that the western terminus of its plant track facilities connecting its unloading dock with its preparation plant is upon the line of the Pittsburgh, Lisbon & Western Railroad Company and is an interchange point for carload traffic; and denies that in the movement of its own raw coal in its own private facilities from its own mines to its own dock and from its own dock to its own preparation plant it is engaged in transportation in interstate commerce.

Defendant avers on the contrary that its before mentioned private track facilities are used by it exclusively in the movement of its own unprepared raw coal from its said unloading dock to its said preparation plant for preparation for market; avers that by means of all of its said private facilities, as aforesaid, it moves its own unprepared raw coal from its own river mines on the Monongahela River, down the Monongahela and Ohio Rivers to its own unloading dock near Smith's Ferry, Pennsylvania on the Little Beaver River; avers that the raw coal is then lifted and transferred by its private unloading facilities at its said dock to its private cars on its private track facilities over which the cars are then moved by its own motive power to its preparation plant at Brush Run, Ohio; avers that at its preparation and processing plant, the raw coal is processed and prepared for market by processes which [fol. 110] change the chemical and physical character of the raw coal; avers that by the washing and cleaning process various mineral impurities constituting about four percent of the raw coal are removed; avers that at said preparation plant the refined coal is then sized into any one or more of twenty-five different sizes and the sizes mixed to meet the requirements of the consumers; avers that the prepared coal resulting from the preparation and processing treatment at said plant is wholly different in chemical and physical character than the raw coal which entered the plant; avers that only the prepared product of the Brush Run plant, and not the raw coal, is sold into commerce by delivery to the common carrier, the Pittsburgh, Lisbon & Western Railroad Company, f. o. b. Negley, Ohio; avers that in the movement of its raw product from its mines to

its Brush Run preparation plant, the Pittsburgh Coal Company carries no coal except its own raw coal; avers that the movement of its raw coal is purely incidental to its preparation for market at its Brush Run plant; and avers that the movement of the raw product from its mines to its Brush Run plant is not transportation in interstate commerce.

Third. For further and additional answer to paragraph 9 of the Petition, defendant denies the allegations of fact contained therein. Defendant specifically denies the inference that the unprepared raw coal, out of which the four carloads of prepared coal here involved were processed, was the same product or of the same chemical and physical character as the prepared product which was carried by defendant, Pittsburgh Coal Company, in its own private facilities from its mines to its preparation plant at Brush Run; denies that the carriage of the raw coal from its mines to the preparation plant was transportation in inter- [fol. 111] state commerce; denies that the prepared coal contained in the four carloads concerned in the instant proceedings was interstate traffic; and denies that interstate tariffs or switching rates are applicable to said shipment of prepared coal.

Defendant on the contrary avers that said four carloads of prepared coal first entered into commerce when delivered by defendant, Pittsburgh Coal Company, to the common carrier, the Pittsburgh, Lisbon & Western Railroad Company, at Negley, Ohio, for delivery to the consignees; and avers that the said carriage by the common carriers, the Pittsburgh, Lisbon & Western Railroad Company and the Youngstown & Suburban Railway Company, was intrastate commerce upon which the intrastate switching rates published in the tariffs of Complainants herein are applicable.

Fourth. For further and additional answer to the allegations of fact contained in paragraph 10 of the Petition, defendant, while denying the relevancy or materiality thereof, admits that the raw coal from which the four carloads of coal here involved were prepared was mined in the State of Pennsylvania; that it was moved down the Monongahela, Ohio, and Little Beaver Rivers to Smith's Ferry, Pennsylvania; that it was loaded into private cars of defendant, Pittsburgh Coal Company, and moved by it

over its private track facilities to its preparation plant at Brush Run in the State of Ohio; that after preparation and processing, the prepared coal was delivered to the common carrier, the Pittsburgh, Lisbon & Western Railroad Company; that said prepared coal was tendered to the Complainants at Youngstown, Ohio, for switching movements by their lines to industries located on and served by the [fol. 112] Complainant, Erie Railroad Company, in the said City of Youngstown, Ohio; and that the Youngstown & Suburban Railway Company in tendering the shipments of coal in question to Complainants proffered as compensation the amount lawfully due on coal moving in intrastate commerce in the State of Ohio; and that Complainants thereupon refused to accept the said shipments until charges based upon tariffs applicable to interstate commerce were paid.

Defendant, Pittsburgh Coal Company, denies that the coal here involved was moved in a continuous journey as alleged; denies that said coal was transported through its preparation plant at Brush Run, Ohio; denies that the raw coal that was moved from its mines to its preparation plant at Brush Run, Ohio, was the same in chemical and physical character as the prepared product that was offered for transportation to the Pittsburgh, Lisbon & Western Railroad Company at Negley, Ohio; denies that interstate rates are applicable to coal so moved from Negley, Ohio to Youngstown, Ohio; denies that the movement of the prepared coal from Negley, Ohio to Youngstown, Ohio, is interstate in character; and denies that tender has not been made to Complainants of the lawful charges applicable to the four carloads involved.

Fifth. For further answer, Defendant, Pittsburgh Coal Company, avers that if it is forced to pay for the intrastate common carrier services here involved at rates applicable to interstate commerce the effect will be to levy an unwarranted penalty or charge upon a purely private enterprise, and to deprive Defendant of its constitutional rights in violation of the Fifth Amendment of the Constitution of the United States.

[fol. 113] Wherefore, this Defendant denies that the Complainants are entitled to the relief prayed for in their

Petition of Complaint, or any part thereof, or any relief whatsoever, and prays that said Petition be dismissed with costs.

Don Rose, Charles E. Blanchard, Solicitors for Pittsburgh Coal Company, Intervening Defendant. Of Counsel: Howard M. Swartz, John Evans Rose, Rose & Eichenauer, 707 Oliver Building, Pittsburgh, Pa. Blanchard, Touvelle & Nida, 42 E. Gay Street, Columbus, Ohio.

May 11, 1935.

[fol. 114] *Duly sworn to by J. D. A. Morrow. Jurat omitted in printing.*

[fol. 115] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF A. S. JENNINGS—Filed Sept. 25, 1935

A. S. Jennings, being first duly sworn on oath, says that he is General Coal Freight Agent of The Pennsylvania Railroad Company; that his office is at Pittsburgh, Pennsylvania, and that all coal traffic within Pennsylvania, within Ohio, and from and between said two states moving via the Pennsylvania Railroad is under his jurisdiction:

That the order of the Public Utilities Commission of Ohio, herein complained of, requires The Pennsylvania Railroad Company to accept bituminous coal traffic which has moved interstate from Pennsylvania into Ohio as tendered to it at Youngstown, Ohio, by The Youngstown & Suburban Railway for switching upon rates fixed by the Public Utilities Commission of Ohio:

That The Pennsylvania Railroad Company, and The Erie Railroad Company with which it connects directly at Youngstown, have tariffs duly and lawfully on file with the Interstate Commecre Commission providing rates for the movement of such traffic in Youngstown:

That the rates upon which the order of the Public Utilities Commission of Ohio requires such traffic to be switched are materially less than the rates applicable upon interstate traffic:

[fol. 116] That if the said order of the Public Utilities Commission of Ohio is permitted to become effective The

Pennsylvania Railroad Company and The Erie Railroad Company will be irreparably injured in that the switching service which is a part of the through movement will perforce have been performed at rates materially less than those applicable, and that said plaintiffs will be without means to effect collection of the balance due:

That said order of The Public Utilities Commission of Ohio not only requires the switching as aforesaid upon the rates fixed by sad Commission, which are less than the cost of the service upon the four carloads of coal here directly involved, but in addition, requires such switching at such rates upon all bituminous coal traffic tendered to The Pennsylvania Railroad Company by The Youngstown & Suburban Railway Company at Youngstown, which traffic is moved under similar circumstances, i.e., mined and produced in Pennsylvania and moved to Youngstown for delivery to consignees:

That for the reason the amount of future traffic, while deemed to be large, cannot be definitely determined at this time, this affiant is unable to state in dollars and cents the amount of the injury which will be irreparably afflicted upon the plaintiffs herein:

That the Bill of Complaint filed herein involves directly four specific carloads of coal, as well as all future shipments similarly circumstanced, and if said order be permitted to become effective the plaintiffs herein will be irreparably damaged and divested of their rights to an adequate and impartial adjudication of the issue for the reason that the four carloads of coal herein referred to will then have been delivered and the issues herein will have become moot.

Affiant further declares that to the best of his knowledge and belief the revenue losses as hereinbefore set forth upon the specific traffic in question and on future traffic similarly [fols. 117 & 118] circumstanced, will be substantial and irretrievable.

Further affiant sayeth not.

(Signed) A. S. Jennings.

Subscribed and sworn to before me this 10th day of May, A. D., 1935. (Signed) J. B. A. Tracey, Notary Public. My Commission expires April 1st, 1939. (Seal.)

[fol. 119] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. A. FERGUSON—Filed Sept. 26, 1935

J. A. Ferguson, being first duly sworn on oath, says that he is Coal Freight Agent of The Erie Railroad Company; that his office is at Cleveland, Ohio, and that coal traffic within Pennsylvania, within Ohio, and from and between said two states is under his jurisdiction:

That the order of The Public Utilities Commission of Ohio, herein complained of, requires The Pennsylvania Railroad Company to accept bituminous coal traffic which has moved interstate from Pennsylvania into Ohio as tendered to it at Youngstown, Ohio, by The Youngstown & Suburban Railway for switching upon rates fixed by The Public Utilities Commission of Ohio:

That The Erie Railroad Company and The Pennsylvania Railroad Company, with which it connects directly at Youngstown, have tariffs duly and lawfully on file with the Interstate Commerce Commission providing rates for the movement of such traffic in Youngstown:

That the rates upon which the order of the Public Utilities Commission of Ohio requires such traffic to be switched are materially less than the rates applicable upon interstate traffic:

[fol. 120] That if the said order of the Public Utilities Commission of Ohio is permitted to become effective The Pennsylvania Railroad Company and The Erie Railroad Company will be irreparably injured in that the switching service which is a part of the through movement will perforce have been performed at rates materially less than those applicable, and that said plaintiffs will be without means to effect collection of the balance due:

That said order of The Public Utilities Commission of Ohio not only requires the switching as aforesaid upon the rates fixed by said Commission, which are less than the cost of the service upon the four carloads of coal here directly involved, but in addition, requires such switching at such rates upon all bituminous coal traffic tendered to The Pennsylvania Railroad Company by The Youngstown and Suburban Railway Company at Youngstown, which traffic is moved under similar circumstances, i. e., mined

and produced in Pennsylvania and moved to Youngstown for delivery to consignees:

That for the reason the amount of future traffic, while deemed to be large, cannot be definitely determined at this time, this affiant is unable to state in dollars and cents the amount of the injury which will irreparably be afflicted upon the plaintiffs herein:

That the Bill of Complaint filed herein involves directly four specific carloads of coal, as well as all future shipments similarly circumstanced, and if said order be permitted to become effective the plaintiffs herein will be irreparably damaged and divested of their rights to an adequate and impartial adjudication of the issue for the reason that the four carloads of coal herein referred to will then have been delivered and the issues herein will have become moot.

Affiant further declares that to the best of his knowledge and belief the revenue losses as hereinbefore set forth [fols. 121 & 122] upon the specific traffic in question and on future traffic similarly circumstanced, will be substantial and irretrievable.

Further affiant sayeth not.

(Signed) J. A. Ferguson.

Subscribed and sworn to before me this 11th day of May, A. D. 1935. (Signed) Olive Phillips, Notary Public. My Commission expires January, 1937.

[fol. 123] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 1132. Equity.

THE PENNSYLVANIA RAILROAD COMPANY, et al., Complainants,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO et al., Defendants

DECREE—Filed Dec. 11, 1935

This cause came on to be heard on the pleadings, the record and the argument of counsel. The court, upon consideration thereof, is of the opinion that there is substantial evidence supporting the finding of the Public Utilities Com-

mission of Ohio that there was no dealing in, or with respect to, this coal in the course of its transportation from the mine in Pennsylvania, from Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania, to Negley, Ohio; that the coal throughout the movement from the mines, from Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania, to Negley, Ohio remained in the ownership, possession and control of the Pittsburgh Coal Company which was also the owner of all the facilities employed in that movement; that there was no transportation of the coal in any original package to Negley, that there was no through and continuous transportation from the mine to Negley, and that there was no commerce in the coal in the course of its transportation from the mine to Negley.

The order complained of in the bill, since the interstate [fol. 124] transportation covered by the record was carried on wholly by private carrier, and since the transportation by common carrier was wholly within the State of Ohio, is lawful and proper (Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Construction Co., 228 U. S. 177; The Pipe Line Cases, 234 U. S. 548, 562; Atlantic Coast Line Rd. Co. v. Standard Oil Co. of Kentucky, 275 U. S. 257), and the prayer of complainants' bill should be denied.

It is therefore by the court ordered, adjudged and decreed that the prayer of complainants in their bill contained be and it is hereby denied and complainants' bill is hereby dismissed at complainants' costs. Exceptions to the ruling and order of the court are allowed to complainants and intervenors.

Florence E. Allen, Judge, United States Circuit Court. Robert R. Nevin, Judge, United States District Court.

Honorable Benson W. Hough, formerly Judge of the United States District Court, Southern District of Ohio, participated in the hearing of this case, and subsequently participated in the conference at which this case was decided. He joined in the conclusion upon which the foregoing order is based. Judge Hough, however, died on November 19, 1935, and the order could not be submitted for his signature.

Florence E. Allen, Judge, United States Circuit Court. Robert R. Nevin, Judge, United States District Court.

[fol. 125] PENNSYLVANIA RAILWAY COMPANY EXHIBIT No. 1

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Docket No. 9113

THE YOUNGSTOWN AND SUBURBAN RAILWAY COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY and ERIE RAILROAD COMPANY

COMPLAINT—Filed Sept. 29, 1934, Public Utilities Commission of Ohio

The Youngstown and Suburban Railway Company, complainant, respectfully represents:

I. That it is a common carrier railroad corporation, organized under the laws of the State of Ohio and located wholly within the State of Ohio; that it operates by electric power and is chartered to operate also by steam power; and that it is engaged in the transportation of property in Ohio intrastate commerce, and particularly in the transportation of bituminous coal from Signal in the State of Ohio to Youngstown, in the State of Ohio, in such intrastate commerce.

II. That at said Signal Complainant has a physical connection with The Pittsburgh, Lisbon & Western Railroad Company, a common carrier railroad corporation also engaged in the transportation of property in Ohio intrastate commerce; that at said Youngstown Complainant has a physical connection with defendant The Pennsylvania Railroad Company, a common carrier railroad corporation also [fol. 126] engaged in the transportation of property in Ohio intrastate commerce; that at said Youngstown said The Pennsylvania Railroad Company has a physical connection with defendant Erie Railroad Company, a common carrier railroad corporation also engaged in the transportation of property in Ohio intrastate commerce; and that by virtue of such railroads and such physical connections there now exists, and for more than a year last past there has existed, a through railroad route whereby property, including bituminous coal, may be transported from shippers and points of

origin in Ohio on said The Pittsburgh, Lisbon & Western Railroad Company via said The Youngstown and Suburban Railway Company and said The Pennsylvania Railroad Company to consignees and points of origin on said Erie Railroad Company in said Youngstown, in through Ohio intrastate commerce.

III. That there are now, and for more than a year last past have been filed with this Commission as required by the laws of Ohio, and in force and effect, schedules and tariffs naming rates and charges applicable to the transportation of bituminous coal from Negley, in the State of Ohio, on said The Pittsburgh, Lisbon & Western Railroad Company, to destinations on said Erie Railroad Company in said Youngstown, via the said connecting through routes of said The Pittsburgh, Lisbon & Western Railroad Company, The Youngstown and Suburban Railway Company, The Pennsylvania Rairoad Company, and the Erie Railroad Company, in Ohio intrastate commerce.

IV. That heretofore, to-wit, on September 17, 1934, Pittsburgh Coal Company, a Pennsylvania corporation, lawfully registered to do business in the State of Ohio, at its plant at said Negley, loaded and delivered to said The Pittsburgh, Lisbon & Western Railroad Company, one carload, to-wit, M.C. car No. 10,990, of nut, stoker, and slack bituminous coal, of estimated weight 94,000 pounds, consigned to Republic Rubber Company; at said Youngstown, with directions to transport the same via the aforesaid through connecting routes of said The Pittsburgh, Lisbon & Western Railroad Company, The Youngstown and Suburban Rail- [fol. 127] way Company, The Pennsylvania Railroad Company, and Erie Railroad Company, in Ohio intrastate commerce, for delivery by said Erie Railroad Company to the plant of said Republic Rubber Company located on its line in said Youngstown.

V. That thereupon, said The Pittsburgh, Lisbon & Western Railroad Company, on said September 17, 1934, received said car of coal, M.C. No. 10,990, from said Pittsburgh Coal Company at said Negley and delivered its receipt therefor, and pursuant to said shipping directions transported said car of coal to said Signal, and there delivered the same to said The Younstown and Suburban Railway Company for further transportation pursuant to said directions; that

thereupon said The Youngstown and Suburban Railway Company received said car of coal and pursuant to said directions transported said car of coal in Ohio intrastate commerce from said Signal to said Youngstown, and there, on, to-wit, September 19, 1934, in the usual and customary manner of interchanging bituminous coal to said The Pennsylvania Railroad Company, delivered said car of coal to said The Pennsylvania Railroad Company for further transportation pursuant to said directions; and that thereupon said The Pennsylvania Railroad Company declined, and ever since has continued to decline, to receive said car of coal and to further transport and deliver the same to said Erie Railroad Company for further transportation on said Erie Railroad Company in Ohio intrastate commerce for delivery to said consignee, pursuant to said directions.

VI. That heretofore, to-wit, on September 17, 1934, said Pittsburgh Coal Company, a Pennsylvania corporation, at its plant at said Negley, loaded and delivered to said The Pittsburgh, Lisbon & Western Railroad Company one carload, to-wit, C. C. C. & St. L. car No. 82,713, of nut, stoker and slack bituminous coal, of estimated weight 104,000 pounds, consigned to Republic Rubber Company at said Youngstown, with directions to transport the same via the aforesaid through connecting routes of said The Pitts- [fol. 128] burgh, Lisbon & Western Railroad Company, The Youngstown and Suburban Railway Company, The Pennsylvania Railroad Company, and Erie Railroad Company, in Ohio intrastate commerce, for delivery by said Erie Railroad Company to the plant of said Republic Rubber Company located on its line in said Youngstown.

VII. That thereupon, said The Pittsburgh, Lisbon & Western Railroad Company, on said September 17, 1934, received said car of coal, C. C. C. & St. L. No. 82,713, from said Pittsburgh Coal Company at said Negley and delivered its receipt therefor, and pursuant to said shipping directions transported said car of coal to said Signal, and there delivered the same to said The Youngstown and Suburban Railway Company for further transportation pursuant to said directions; that thereupon said The Youngstown and Suburban Railway Company received said car of coal and pursuant to said directions transported said car of coal in Ohio intrastate commerce from said Signal

to said Youngstown, and there, on, to-wit, September 19, 1934, in the usual and customary manner of interchanging bituminous coal to said The Pennsylvania Railroad Company, delivered said car of coal to said The Pennsylvania Railroad Company for further transportation pursuant to said directions; and that thereupon said The Pennsylvania Railroad Company declined, and ever since has continued to decline, to receive said car of coal and to further transport and deliver the same to said Erie Railroad Company for further transportation on said Erie Railroad Company in Ohio intrastate commerce for delivery to said consignee, pursuant to said directions.

VIII. That heretofore, to-wit, on September 17, 1934, said Pittsburgh Coal Company, a Pennsylvania corporation, at its plant at said Negley, loaded and delivered to said The Pittsburgh, Lisbon & W[illegible] Railroad Company one carload, to-wit, P. & L. E. car [illegible]o. 50,767, of block bituminous coal, of estimated weight 104,000 pounds, consigned to Youngstown Ice Company, at said Youngstown, with [fol. 129] directions to transport the same via the aforesaid through connecting routes of said The Pittsburgh, Lisbon & Western Railroad Company, The Youngstown and Suburban Railway Company, The Pennsylvania Railroad Company and Erie Railroad Company, in Ohio intrastate commerce, for delivery by said Erie Railroad Company to the plant of said Youngstown Ice Company located on its line in said Youngstown.

IX. That thereupon, said The Pittsburgh, Lisbon & Western Railroad Company, on said September 17, 1934, received said car of coal, P. & L. E. No. 50,767, from said Pittsburgh Coal Company at said Negley and delivered its receipt therefor, and pursuant to said shipping directions transported said car of coal to said Signal, and there delivered the same to said The Youngstown and Suburban Railway Company for further transportation pursuant to said directions; that thereupon said The Youngstown and Suburban Railway Company received said car of coal and pursuant to said directions transported said car of coal in Ohio intrastate commerce from said Signal to said Youngstown, and there, on, to-wit, September 19, 1934, in the usual and customary manner of interchanging bituminous coal to said The Pennsylvania Railroad Company, delivered said

car of coal to said The Pennsylvania Railroad Company, for further transportation pursuant to said directions; and that thereupon said The Pennsylvania Railroad Company declined, and ever since has continued to decline, to receive said car of coal and to further transport and deliver the same to said Erie Railroad Company for further transportation on said Erie Railroad Company in Ohio intrastate commerce for delivery to said consignee, pursuant to said directions.

X. That heretofore, to-wit, on September 17, 1934, said Pittsburgh Coal Company, a Pennsylvania corporation, at its plant at said Negley, loaded and delivered to said The Pittsburgh, Lisbon & Western Railroad Company one carload, to-wit, C. C. C. & St. L. car No. 79,123, of furnace bituminous coal, of estimated weight 100,000 pounds consigned to Youngstown Ice Company at said Youngstown [fol. 130] with directions to transport the same via the aforesaid through connecting routes of said The Pittsburgh, Lisbon & Western Railroad Company, The Youngstown and Suburban Railway Company, The Pennsylvania Railroad Company and Erie Railroad Company, in Ohio intrastate commerce, for delivery by said Erie Railroad Company to the plant of said Youngstown Ice Company located on its line in said Youngstown.

XI. That thereupon, said The Pittsburgh, Lisbon & Western Railroad Company, on said September 17, 1934, received said car of coal, C. C. C. & St. L. No. 79,123, from said Pittsburgh Coal Company at said Negley and delivered its receipt therefor, and pursuant to said shipping directions transported said car of coal to said Signal, and there delivered the same to said The Youngstown and Suburban Railway Company for further transportation pursuant to said directions; that thereupon said The Youngstown and Suburban Railway Company received said car of coal and pursuant to said directions transported said car of coal in Ohio intrastate commerce from said Signal to said Youngstown, and there, on, to-wit, September 19, 1934, in the usual and customary manner of interchanging bituminous coal to said The Pennsylvania Railroad Company, delivered said car of coal to said The Pennsylvania Railroad Company for further transportation pursuant to said directions; and that thereupon said The Pennsylvania

Railroad Company declined, and ever since has continued to decline, to receive said car of coal and to further transport and deliver the same to said Erie Railroad Company for further transportation on said Erie Railroad Company, in Ohio intrastate commerce, for delivery to said consignee, pursuant to said directions.

XII. That defendant The Pennsylvania Railroad Company, for a long time up to and including September 18, 1934, has received from Complainant, The Youngstown and Suburban Railway Company, at their said point of physical connection in said Youngstown, carloads of bituminous coal theretofore transported thereto by said The Youngstown and Suburban Railway Company in Ohio intrastate com- [fol. 131] merce for further transportation in such commerce by said The Pennsylvania Railroad Company to its said point of physical connection with said Erie Railroad Company, for further transportation in such commerce by said Erie Railroad Company for delivery to consignees on its line in said Youngstown; and that said The Pennsylvania Railroad Company at no time up to and including September 18, 1934, declined to receive such carloads of coal and so to further transport the same in Ohio intrastate commerce, but on the contrary did receive and so further transport such carloads of coal in Ohio intrastate commerce pursuant to the directions of the shippers thereof as transmitted to it by complainant, The Youngstown and Suburban Railway Company, and in accordance with the provisions of the schedules and tariffs of rates and charges lawfully applicable to such transportation in Ohio intrastate commerce.

XIII. That Complainant, The Youngstown and Suburban Railway Company, is informed and believes, and upon such information and belief avers, that those employees of defendant, The Pennsylvania Railroad Company, ordinarily charged with the duty of receiving and transporting the above-described four carloads of bituminous coal in Ohio intrastate commerce in Youngstown, as aforesaid, have been instructed by their superior officers not to receive and transport the above-described four carloads of bituminous coal and not to receive and transport any other carloads of bituminous coal likewise and under like directions delivered by Complainant, The Youngstown and Sub-

urban Railway Company to defendant The Pennsylvania Railroad Company, for further transportation in Ohio intrastate commerce.

XIV. That Complainant, The Youngstown and Suburban Railway Company has been informed by employees of defendant, Erie Railroad Company, that said defendant, in the event that the above described four carloads of bituminous coal, or any other carloads of bituminous coal likewise and under like circumstances loaded and billed for transportation in Ohio intrastate commerce, are delivered by Complainant, The Youngstown and Suburban Railway Com- [fol. 132] pany, to defendant, The Pennsylvania Railroad Company, are in turn delivered by said defendant, The Pennsylvania Railroad Company, to said defendant, Erie Railroad Company, for further transportation and delivery to the respective consignees thereof, said defendant, Erie Railroad Company, will thereupon decline to receive transport, and deliver said carloads of coal in Ohio intrastate commerce.

XV. That subsequent to the delivery, as aforesaid, by Complainant, The Youngstown and Suburban Railway Company, to defendant, The Pennsylvania Railroad Company of the above described four carloads of bituminous coal, said The Pennsylvania Railroad Company on or about, to-wit, September 22, 1934, delivered to Complainant a certain notice reading as follows:

"The Pennsylvania Railroad Company

Notice of Prepayment

September 18, 1934.

Effective at once this Company will not accept shipments of bituminous coal, carloads, from the Youngstown and Suburban Railway at its interchange in Youngstown, Ohio, for delivery to individuals or industries on its own or connecting lines within the switching limits of Youngstown which do not originate at mines within the State of Ohio, until all charges from its connection with the Youngstown and Suburban Railway to point of ultimate delivery are fully prepaid at rates published in tariffs on file with the Interstate Commerce Commission.

J. B. McCorkle, General Coal Freight Agent."

XVI. That following the receipt by it of said Notice of Prepayment from defendant, The Pennsylvania Railroad Company, Complainant, The Youngstown and Suburban Railway Company, continued its offer and delivery to said defendant of the above described four carloads of bituminous coal, and in connection therewith tendered to said defendant in lawful money of the United States of America, [fol. 133] the full amount of the charges for the further transportation and delivery of said four carloads of bituminous coal by said defendants, The Pennsylvania Railroad Company and Erie Railroad Company, to the respective consignees thereof, in strict accordance with the rates and charges for said service as prescribed in the schedules and tariffs applicable to Ohio intrastate commerce, as published by said defendants and filed with this Commission, as required by law; and that nevertheless and notwithstanding, said defendant, The Pennsylvania Railroad Company, continued, and ever since has continued to decline to receive and to further transport and deliver said four carloads of bituminous coal to said Erie Railroad Company, in Ohio intrastate commerce, for delivery to said consignees.

XVII. That so, defendants The Pennsylvania Railroad Company and Erie Railroad Company, at the times and places and in the manner and form aforesaid, have failed, omitted and neglected, and threaten to continue to fail, omit and neglect, without unreasonable delay to transfer, switch and deliver cars of bituminous coal, destined to a point on said Erie Railroad Company as a connecting line beyond said The Pennsylvania Railroad Company, in Ohio intrastate commerce; that accordingly said defendants have failed, omitted and neglected, and threaten to continue to fail, omit and neglect to furnish reasonably adequate service and facilities for the Ohio intrastate transportation of bituminous coal, and have in effect abandoned such service of transportation; and that therefore said defendants have violated, are violating, and threaten to continue to violate the General Code of Ohio and particularly Sections 504, 504-2, 527, 614-42, and 614-67 thereof.

Wherefore, Complainant, The Youngstown and Suburban Railway Company, prays that said defendants be required to answer the charges herein, and upon the earliest lawful notice; that after prompt and due hearing and investigation

[fol. 134] the Commission issue its order commanding these defendants and each of them to cease and desist from the violations of law herein complained of; and that the Commission order and direct these defendants and each of them, without unreasonable delay or discrimination to transfer, switch and deliver the four above-described carloads of bituminous coal and any other carloads of bituminous coal likewise loaded, shipped, and billed from the point of physical connection of complainant and defendant The Pennsylvania Railroad Company in said Youngstown via the connecting routes of said defendants in said Youngstown, to consignees located on the line of defendant Erie Railroad Company in said Youngstown.

Dated this 27th day of September, 1934.

The Youngstown and Suburban Railway Company, 21 East Front Street, Youngstown, Ohio, (Signed) by August G. Gutheim, 712 Jackson Place, Washington, D. C., Attorney.

[fol. 135] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Docket No. 9913

THE YOUNGSTOWN AND SUBURBAN RAILWAY COMPANY

vs.

THE PENNSYLVANIA RAILROAD COMPANY and ERIE RAILROAD COMPANY

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY

Now comes The Pennsylvania Railroad Company, one of the defendants named in the above entitled complaint, and for answer to said complaint respectfully states:

I

This defendant admits that The Youngstown and Suburban Railway Company, complainant herein, is a common carrier railway operated entirely by electricity; but denies that it is engaged "particularly in the transportation of bituminous coal from Signal, in the State of Ohio, to

Youngstown, in the State of Ohio", and says that the said interurban electric line is also engaged in the transportation of property in interstate commerce, and also does an urban and interurban passenger business.

II

This defendant admits the allegations in Paragraph II of said complaint, but avers that said The Pennsylvania Railroad Company and Erie Railroad Company, named in said paragraph, likewise are engaged in interstate commerce and maintain interstate routes and rates whereby property may be transported in interstate commerce from shippers and points of origin on the said The Pittsburgh, Lisbon & Western Railroad Company via the said The Youngstown and Suburban Railway Company to consignees and points of destination on said The Pennsylvania Railroad Company and Erie Railroad Company in said Youngstown under tariffs lawfully published and on file with the Interstate Commerce Commission.

III

This defendant admits the allegations in Paragraph III, of said complaint, but avers that the same facts are true as to interstate rates and commerce, and further avers that no coal is mined or produced at Negley, Ohio.

IV—V—VI—VII—VIII—IX—X—XI

This defendant denies the allegations in Paragraphs IV to XI, inclusive.

XII

As to the allegations in Paragraph XII of said complaint, this defendant denies knowledge or information sufficient to form a belief with respect thereto.

XIII

This defendant denies the allegations in Paragraph XIII of said complaint.

[fol. 136] XV

This defendant denies that there has been delivery or acceptance of the said cars on the date alleged, or upon any other date, to The Pennsylvania Railroad Company.

XVI

This defendant denies the allegations contained in paragraph XVI.

XVII

This defendant denies the allegations contained in paragraph XVII.

The Pennsylvania Railroad Company, by —— ——, Agent in its Behalf. Guernsey Orcutt, of Counsel, 925 Pennsylvania Station, Pittsburgh, Pennsylvania.

October 16, 1934.

[fols. 137 & 138] PENNSYLVANIA RY. CO. EXHIBIT No. 2

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 9913

THE YOUNGSTOWN & SUBURBAN RAILWAY COMPANY, Complainant,

v.

THE PENNSYLVANIA RAILROAD COMPANY and THE ERIE RAILROAD COMPANY, Defendants

Proceedings and Testimony

Before Honorables Charles F. Schaber, Public Utilities Commissioner, and J. W. Herrold, Special Examiner, Beginning on Wednesday, October 17th, 1934

[fol. 139] [Title omitted]

APPEARANCES

Mr. August T. Gutheim (Washington, D. C.), on behalf of the Complainant.

Mr. Guernsey Orcutt, (Pittsburgh, Pennsylvania), on behalf of the Pennsylvania Railroad Company.

Mr. William T. Pierson, (Cleveland, Ohio), on behalf of the Erie Railroad Company.

Mr. L. P. Day (Chicago, Illinois), on behalf of the New York Central Railroad Company, The Pittsburgh & Lake Erie Railroad Company, and The Lake Erie and Eastern Railroad Company, Intervenors.

Mr. John J. Fitzpatrick (Baltimore, Maryland), on behalf of The Baltimore & Ohio Railroad Company, an Intervenor.

[fol. 140] Wednesday Morning Session,
October 17, 1934.

COLLOQUY

Commissioner Schaber: The matter for consideration at this time is the Youngstown & Suburban Railway Company versus the Pennsylvania Railroad Company and the Erie Railroad Company, docket number 9913. If the parties are ready to proceed they may enter their appearances.

Mr. Gutheim: August T. Gutheim, 712 Jackson Place, Washington, D. C., for the complainant.

Mr. Orcutt: Mr. Willis Pierson, Leo P. Day, John J. Fitzpatrick and Guernsey Orcutt for the defendants and intervenors.

I think, if Your Honor please, that we are ready but we are not quite sure. If the complainant in this case presents all of the facts, as we think they will, we are ready to proceed. There are certain essential facts here which are peculiarly within the control of the complainant and if those facts aren't produced or if any attempt is made to conceal them we will have to ask for a postponement and subpœnaes and opportunity to prepare further evidence. I think there will be no difficulty of that.

Commissioner Schaber: We will consider that at the time it is presented. You may state the nature of your complaint, Mr. Gutheim.

Mr. Fitzpatrick: Mr. Commissioner please, before Mr. Gutheim proceeds, I have prepared a petition of intervention in behalf of the Baltimore & Ohio Railroad and certain other carriers. It was prepared only a few days ago and I brought it with me instead of sending it to the Commission. May I offer it at this time, please?

Commissioner Schaber: Has a copy been handed to Mr. Gutheim?

[fol. 141] Mr. Fitzpatrick: I have a copy for Mr. Gutheim. How many copies will the Commission require?

Examiner Herrold: Three.

Mr. Fitzpatrick: The original is properly executed.

Examiner Herrold: Does it broaden the issues?

Mr. Fitzpatrick: It does not. The original left with the reporter are properly executed by affidavit.

Mr. Gutheim: If Your Honor please, I observe that these petitioners, the B. & O., the Lake Erie & Eastern, the Pittsburgh & Lake Erie and the New York Central are the Youngstown lines other than the two named defendants. They have no particular interest in this particular transportation, although doubtless they do have an interest in the general question in that all of them may at some time or another be in this identical situation in which these defendants find themselves. I take it that under the circumstances if this intervention is permitted and these parties are here as intervening defendants that they would be bound as though they were named defendants by any order of the Commission with respect to this particular subject in controversy.

Mr. Fitzpatrick: Well of course our position here is that the Commission can't issue any valid order that may bind the intervening carriers in this proceeding. We are interested in this proceeding because the carriers covered by the petition handle coal to Youngstown in competition with the defendants and also the complainant. I might state this very frankly to Mr. Gutheim, if Mr. Gutheim is willing to stipulate here that all the coal that may be delivered to the intervenors by the Y. & S. Railway in the future is interstate traffic, then gladly we will withdraw the petition.

[fol. 142] Mr. Gutheim: Well of course Mr. Gutheim will not stipulate himself out of court, Mr. Commissioner.

Commissioner Schaber: Well, the intervenors' petition may be filed. Of course we can't prejudge what the ultimate order will be in this case. But it occurred to me that the intervenors coming into this case voluntarily, they would necessarily be bound by the order as made by the Commission.

Mr. Day: Well if the order was a valid one, Mr. Commissioner,—

Commissioner Schaber: Well we assume we will only issue valid orders.

Mr. Day: And imposed certain obligations on these defendants, then certainly the same regulations, the same law would automatically apply to the intervenors.

Commissioner Schaber: Yes.

Mr. Day: Whether they were intervenors or not.

Commissioner Schaber: I guess that is true. You may present them.

Mr. Gutheim: Do you want the case stated?

Commissioner Schaber: You might state it. I haven't read the complaint. It is all foreign to me.

Mr. Gutheim: The substance of the complaint, Mr. Commissioner, is this. The complainant, the Youngstown & Suburban, has a physical connection at Signal, Ohio, with the Pittsburgh, Lisbon & Western. It has a physical connection at its northern end at Youngstown with the Pennsylvania Railroad. The Pennsylvania Railroad in turn has a physical connection at Youngstown with the Erie.

At Negley, Ohio, on the Pittsburgh, Lisbon & Western, the complainant has offered to it certain carload shipments of coal billed from Negley by the Pittsburgh Coal Company [fol. 143] from its plant at Negley with instruction to move those cars of coal via the Pittsburgh, Lisbon & Western, Signal as the interchange point, and thence via the complainant's line, the Youngstown & Suburban, to Youngstown, there to be delivered to the Pennsylvania and the Pennsylvania in turn to deliver it to the Erie for ultimate delivery to consignees who were on the Erie rails in Youngstown.

It is admitted in the answers that there are physical through routes that permit that transportation.

We shall prove that there are intra-state Ohio rates which are applicable to that classification.

These four carloads of coal were transported in accordance with the shipping directions by the Pittsburgh, Lisbon & Western, interchanged to the Youngstown & Suburban, transported by the Youngstown & Suburban to Youngstown and there in the manner usual and customary as respects interchange between Youngstown & Suburban and the Pennsylvania, the cars were placed on the Youngstown & Suburban-Pennsylvania interchange and the transfers were placed in what is known as the bill box, the usual receptacle where bills of that sort are placed as notice to the Pennsylvania that those cars are delivered to it by the Youngstown & Suburban for further delivery in accordance with the instructions on the bill.

Thereupon the Pennsylvania Railroad refused to accept and deliver those cars in accordance with the billing and it took the cars off of the Y. & S.-Pennsylvania interchange and shifted them over to the P. R. R.-Y. & S. interchange. That shift was several times gone through but in each event the cars were then again taken by the Youngstown & Suburban and placed on the Youngstown & Suburban-P. R. R. [fol. 144] interchange for redelivery to the Pennsylvania and the bills remained in the bill box. The Pennsylvania continued its refusal to move the cars.

Subsequent to that first refusal the Pennsylvania served upon the Youngstown & Suburban a notice of prepayment of charges, which, in substance, stated that thereafter the Pennsylvania would not switch cars such as the four that were then offered to it and delivered to it in that manner if the coal therein was not mined in the state of Ohio unless the charges were prepaid at the rates in the tariffs on file with the Interstate Commerce Commission.

Thereupon the complainant made a tender to the Pennsylvania of the charges for the further transportation from that interchange to the consignee at the lawful rates on file with the Ohio Public Utilities Commission.

That offer, that tender was refused and the Pennsylvania continued its refusal to receive the cars and that is the status of the matter today.

This complaint is brought asking that Your Honors, that the Commission issue an order commanding the Pennsylvania and the Erie, which has served notice upon the complainant that it also will not receive these cars, to deliver them in intra-state Ohio commerce at the lawful rates on file with the Ohio Public Utilities Commission and commanding them also to receive any other cars similarly received by the Pittsburgh, Lisbon & Western for delivery in Youngstown in Ohio intra-state commerce.

Mr. Orcutt: I wonder, Mr. Gutheim, if you would mind also stating where the coal originated in these four cars?

Mr. Gutheim: I don't know where the coal originated, Mr. Orcutt, but I will say this, that when I read your notice of [fol. 145] prepayment, it struck me as a rather presumptious circular that the trunk line railroads would attempt to oust the Ohio Public Utilities Commission of jurisdiction over traffic which was, so far as locality was concerned, Ohio intra-state commerce on the mere assumption that the

coal was not mined in the state of Ohio. That is not of interest to the jurisdiction of this Commission.

Mr. Orcutt: Of course you are forced to take that position in view of the position you have taken in this case. To do otherwise, as you said a few moments ago, you would put yourself out of court.

Mr. Gutheim: Well I don't admit that.

Mr. Orcutt: I think, Your Honor please, that Mr. Gutheim might have been perfectly frank in this matter and stated exactly what the issue in this case was. I presume there will be considerable testimony, maybe some documentary evidence, and I think the Commission can see more clearly through the cloud or fog that the complainants will attempt to cast into the real facts in this case if the Commission is advised what the issue is. Now Mr. Gutheim, for some reason or other, has skirted all around it but hasn't stated frankly to this Commission that the sole and only issue in this case is whether this traffic is interstate or intrastate. If it is intra-state this Commission has jurisdiction of it. If it is interstate this Commission has no jurisdiction of it. Now that frankly is the issue here.

Mr. Gutheim: Unfortunately, Mr. Commissioner, the answer which these defendants have filed makes no admission of what this transportation is at all as to the physical movement and I am under the necessity, in view of the answers which have been filed, of going forward and proving all of the physical facts of transportation of these particular cars [fol. 146] of coal and the physical facts of transportation are as I have stated in my opening. If, at that time, these gentlemen have other evidence which they desire to introduce which they think will serve to oust this Commission of jurisdiction of what is in at least in its first sense intrastate Ohio traffic, that is for them to produce. And when that is done we will do whatever is necessary on our part to see that the Commission is informed of all the facts.

Mr. Orcutt: If Your Honor please, of course, as every lawyer knows, when answers are filed all you need to do is to traverse the allegations of the complaint. Mr. Gutheim very studiously and carefully drew his complaint to stay away entirely from every interstate question. Of course it is impossible to draw a question involving interstate shipments and stay away from the interstate question of it. But when we filed our answers we merely traversed the

allegations in the complaint. We are not filing any new complaint here. We don't need to make any affirmative averments on our part. We are here defending Mr. Gutheim's case.

Mr. Gutheim: We are prepared to make the necessary proof to sustain the necessary averments.

Commissioner Schaber: Well, it is contended, isn't it, by complainants that the carriers complained against are entering upon a rate as established by the Interstate Commerce Commission which applies to an interstate shipment?

Mr. Orcutt: There is no question of rates here at all, if the Commission please. There is no allegation. There is no rate stated in the complaint. There is no allegation in there that the rates that we are seeking to charge are unreasonable in any way. It is merely the question of whether [fol. 147] the state tariff or the interstate tariff applies to this shipment without any question as to the quantum of the rates or the quantum of the switching charge.

Commissioner Schaber: I understand that. It is a question of which particular tariff applies, isn't that true?

Mr. Orcutt: That is true.

Commissioner Schaber: Now the respondents here, I gathered from the statement of Mr. Gutheim, are insisting upon a payment of the tariff as fixed by the Interstate Commerce Commission, which would apply to an interstate shipment, is that correct?

Mr. Orcutt: We are insisting, if Your Honor please, that this being an interstate shipment and so manipulated by complainants as to move under the guise of an intra-state shipment is, nevertheless what it really is and we legally have no right to charge anything other than the interstate basis. If we did we should be indicated by the United States Government.

Commissioner Schaber: Of course I am in doubt right now from the statement of counsel as to who has the burden of proof as to the real character of this shipment. The complaint is that the respondents here are insisting on a tariff which applies to an interstate shipment and, therefore, that it is an interstate shipment. Complainant is insisting that it is an intra-state shipment. At this time I am unable to satisfy myself upon whom the burden might be to establish the real fact in this matter. But I think

what we should do is try to get the facts, regardless of who has the burden to show them. We will permit the complainant to go forward as far as he feels himself able to go and if we conclude that other facts have to be established before we could dispose of the matter, why, we will have to rule as we find necessary at that time.

[fol. 148] Mr. Orcutt: As to the burden, of course, Your Honor will appreciate the fact that we have no prayer before this Commission. We are here seeking nothing. The complainant has alleged that we have failed to do certain things. Obviously if all the facts are before this Commission——

Commissioner Schaber: We are not necessarily bound by the usual rules in courts of law as to burdens of proof. I think the Commission wants to get the facts, if it has to go out and find them for itself.

Mr. Orcutt: That is what I think, and we are here disposed to help the Commission in every way possible in getting full and complete facts in connection with this matter.

Commissioner Schaber: Well, we will ask all the parties here to aid the Commission in getting the facts relating to this case and we will determine later on whether any particular burden is required which it is necessary to be met. Have you any statement you desire to make other than what you have made?

Mr. Orcutt: I have not, Your Honor please.

Commissioner Schaber: You may then proceed.

Mr. Gutheim: Before proceeding, Mr. Commissioner, may I just state that I understood Mr. Orcutt to say that the complainant had manipulated the pleadings of transportation facts, and I just want the record to show that we deny that there is anything of that sort.

Commissioner Schaber: Well, anything in the form of argument will be considered later on.

Mr. Day: May I ask Mr. Gutheim a question; Mr. Commissioner?. Mr. Gutheim, you answered Mr. Orcutt that you didn't know the origin of this coal. Will you state that [fol. 149] it originated somewhere in the State of Pennsylvania?

Mr. Gutheim: I don't know that, Mr. Day.

Mr. Day: You do not know?

Mr. Gutheim: No, I don't know that.

Mr. Day: Will you state how the coal was handled up to Negley?

Mr. Gutheim: I don't know that definitely but I assume that it was handled from Smiths Ferry over the private railroad of the Pittsburgh Coal Company to Negley.

Mr. Day: To the cleaning plant?

Mr. Gutheim: Yes.

Commissioner Schaber: May I ask, gentlemen, where Negley is; is that in Ohio?

Mr. Gutheim: Negley, Ohio. And in that handling it was handled of course over the railroad which Judge West, of the Eastern District, United States District Court in Ohio, has recently held was a private railroad, a plant facility of the Pittsburgh Coal Company, and not in any way subject to the Interstate Commerce Act. I appreciate that that decision of Judge West is now on appeal by the Pennsylvania and the Pittsburgh & Lake Erie, but that is the status of the situation today. Now as to where that coal came from, if my surmise is correct that it came up the railroad from Smiths Ferry, I don't know.

Mr. Fitzpatrick: Well, would you mind stating your information on that point?

Mr. Gutheim: I haven't any information on that point.

Mr. Fitzpatrick: You don't know one way or the other?

Mr. Gutheim: I don't know where this coal came from.

Mr. Day: Mr. Gutheim, you have long been associated [fol. 150] with the Pittsburgh Coal Company?

Mr. Gutheim: Yes.

Mr. Day: You know that this was Pittsburgh Coal Company's coal?

Mr. Gutheim: Oh yes. The evidence we will offer will show that.

Mr. Day: And necessarily it would have to originate in Pennsylvania, wouldn't it?

Mr. Gutheim: I don't know that that is necessarily so. I don't know what the limits of the Pittsburgh Coal Company are.

Mr. Day: And aren't you willing to say as a matter of fact that the coal was put through the cleaning plant or washery at Brush Run?

Mr. Gutheim: Perfectly willing to state that. That is my understanding. That is the only way it could come out.

Mr. Day: After it came up from Smiths Ferry it was put through the cleaning plant at Brush Run and then handled through Negley in connection with the P. L. & W?

Mr. Gutheim: Part of it.

Mr. Day: These four cars, only part of them?

Mr. Gutheim: Only part of it that came into the cleaning plant is handled out from the cleaning plant and the rest is down there on the ground dumped.

Mr. Day: I am talking about the four cars that came up to Youngstown.

Mr. Gutheim: Those four cars came out of the cleaning plant. I don't know just how that particular coal came into the cleaning plant.

Mr. Day: But they were all handled from the cleaning [fol. 151] plant at Brush Run?

Mr. Gutheim: They must have been because that is what our billing shows.

Commissioner Schaber: I would like to know whether these particular points are in Ohio or Pennsylvania. My geography is limited.

Mr. Day: Smiths Ferry is in Pennsylvania. It is a point on the Ohio River where the—I guess that is all you want to know at this time.

Mr. Gutheim: All the other points named are in Ohio.

Commissioner Schaber: Brush Run?

Mr. Gutheim: Brush Run is in Ohio.

Commissioner Schaber: Where is Brush Run with respect to Negley?

Mr. Gutheim: It is substantially Negley.

Mr. Orcutt: About a mile south of Negley, I believe.

Mr. Gutheim: I can't tell you that.

Mr. Orcutt: I am not asking you. I am telling Mr. Schaber.

Commissioner Schaber: You admit, Mr. Gutheim, that this coal came in over the private railroad of the Pittsburgh Coal Company?

Mr. Gutheim: I don't know that. I surmise it did. And I am prepared at any time that the burden goes to the point where we must make any further proof, as I outlined in our opening, to make such proof as is necessary. But I am proving and propose to prove only those allegations that are necessary to support my complaint as I see it.

Mr. Fitzpatrick: In order that I may understand you, Mr. Gutheim, at least your explanation, do you not concede

[fol. 152] that this coal moved over the private railroad from Smiths Ferry, Pennsylvania, to the cleaning plant which is in Ohio?

Mr. Gutheim: No, I don't concede that.

Mr. Fitzpatrick: Well then, will you kindly answer this, what I have stated and asked for as a concession, isn't that actually your information?

Mr. Gutheim: No, because this coal that was shipped was shipped from the cleaning plant and so far as the Youngstown & Suburban is concerned it got four specified cars of coal. Now I surmise that some time or other that coal in one form or another may have moved on that railroad. I don't know in what form or when or how.

Mr. Fitzpatrick: Well, then, may I understand this, please, do you state in behalf of the Youngstown & Suburban that as a matter of fact it doesn't know whether the coal is intrastate or interstate?

Mr. Gutheim: No, I will state as a matter of fact that the Youngstown & Suburban knows that the coal from Negley to Youngstown is intrastate.

Commissioner Schaber: What would you say, Mr. Fitzpatrick, if this coal was actually mined in Pennsylvania and sent to the Brush Run cleaning plant, not consigned to any particular individual in Ohio, then from that point consigned to someone in Ohio, would that be interstate or intrastate movement?

Mr. Fitzpatrick: That is our position. Obviously at all times a through movement beyond Negley is contemplated, it is a through interstate movement.

Commissioner Schaber: You contend it is a through movement?

Mr. Fitzpatrick: I do.

[fol. 153] Commissioner Schaber: If it were not a through movement what would you say as a matter of law whether that is interstate or intra-state?

Mr. Fitzpatrick: There might be room for argument as to the use of the word "through", but our position, that is, of defendants and intervenors, is that all of this traffic is interstate traffic.

Commissioner Schaber: You have a nice question, Gentlemen. Now let's go ahead.

Examiner Herrold: Before you start, it appears to me the Commission ought to know where this coal came from.

Mr. Orcutt: That was the purpose of the question I proposed to ask Mr. Gutheim, if Your Honor will permit me to ask him another question. I understand Mr. Gutheim admits that he is counsel at times for the Pittsburgh Coal Company, which is the shipper of these four cars. The allegation that they are the shipper appears in the complaint. Now I happened to see Mr. J. D. A. Morrow this morning at breakfast. He is president of the Pittsburgh Coal Company. I would like to ask Mr. Gutheim if he will ask Mr. Morrow to appear here for the purpose of answering such questions under oath as we may desire to put to him? I think that is no more than fair and it will clean up much of the fog that Mr. Gutheim seeks to cast upon this record by saying he has no idea at all where the coal came from.

Commissioner Schaber: Who is Mr. Morrow?

Mr. Orcutt: He is President of the Pittsburgh Coal Company, the shipper of these four cars, and the owner of the washery.

Mr. Day: And the director of all of the railroads that are mentioned here and will be referred to.

[fol. 154] Mr. Gutheim: Well I don't think that last is the fact. In fact I am quite sure it is not the fact because the president of the railroad just avowed that it is not. May I say this, that as we see it if we prove the allegations of this complaint we are entitled to the order that we seek. If when we sustain that burden of proof these defendants then propose to go forward with any proof on their part and what they prove makes it incumbent upon it or makes it to our mind seem desirable from the standpoint of the Commission that we should bring here additional witnesses with the transportation back of Negley, then I would ask the Pittsburgh Coal Company to furnish evidence along that line. But there is no burden upon us to prove that this is anything other than intrastate commerce and when we sustain that burden my position is that we are entitled to the order until these gentlemen prove that it is interstate commerce.

Commissioner Schaber: Well, you proceed, Mr. Gutheim, and make your case as you think it should be made and we will see where we get.

Mr. Orcutt: First I would like to substantiate definitely whether Mr. Gutheim refuses to accede to my request to

ask Mr. Morrow to be present here? I have asked him if he would. I think it would clear up much of this uncertainty here, and the Commissioner has stated that they are not so much interested in the question of the burden of proof as they are in getting all of the facts. Now of course it is Mr. Gutheim's——

Commissioner Schaber: Well, we will ask Mr. Morrow to make himself available if you care to ask him any questions.

Mr. Orcutt: I didn't get that.

Commissioner Schaber: I say the Commission will ask [fol. 155] Mr. Morrow to make himself available to testify should you desire to ask him any question.

Mr. Orcutt: Thank you.

Mr. Gutheim: I can have Mr. Morrow here if you want him at two o'clock this afternoon, Mr. Commissioner. Mr. Fowler.

Mr. Day: Mr. Gutheim, my question was in connection with your statement that not all of the coal at the cleaning plant was shipped to Youngstown. Can you state how much of the coal there was?

Mr. Gutheim: I don't know, but there is a considerable percentage of it lost in the process of cleaning.

Mr. Day: Is there some still at Negley or Smiths Ferry?

Mr. Gutheim: I couldn't tell you that.

Mr. Orcutt: We can tell you that if you want us to.

Be it remembered, That the Complainant, to maintain the issues on its part to be maintained, offered and introduced in testimony on its behalf the following evidence, to-wit:

[fol. 156] William E. Fowler, called on behalf of the Complainant, being first duly sworn, testified as follows:

Examined by Mr. Gutheim:

Q. Mr. Fowler, will you state your name, residence and occupation?

A. William E. Fowler. I live in Youngstown. I am President of the Youngstown & Suburban Railway Company.

Q. Do you have any official connection with any other railroads in Ohio?

A. I am also President of the Pittsburgh, Lisbon & Western Railroad Company.

Q. And for how long have you held these positions?

A. Approximately a year.

Q. Were you previously in the service of these companies or in any other railroad service, and if so, what?

A. I have been in railroad work practically all of my working life, starting with the Pennsylvania Railroad in 1909. I have been with the——

Q. Well, that is sufficient, I take it, for qualifications. Mr. Fowler, will you state what the location of the complainant, the Youngstown & Suburban, is physically and what the nature of its operation is?

A. The Youngstown & Suburban Railway is an interurban electric railroad handling both passengers and freight. It extends south from the city of Youngstown through the village of Columbiana and extending further south to the village of Signal where it connects with the Pittsburgh, Lisbon & Western Railroad. It has a spur line running from Columbiana to Leetonia, Ohio.

The mileage from Youngstown to Signal is 22 and a fraction miles. The road is operated by electric power, passenger business is handled in interurban electric cars and freight business is handled in standard railroad equipment [fol. 157] with an electric locomotive.

Q. Is it qualified to operate in any manner other than by electricity?

A. It has a charter right to operate by steam and other motive power.

Q. Is the Youngstown & Suburban a party to through routes and joint rates for freight traffic?

A. It is.

Q. What are its physical connections?

A. It has a physical connection with the Pittsburgh, Lisbon & Western Railroad at Signal, through which traffic is interchanged. It has a physical track connection with the Pennsylvania Railroad at Columbiana through which traffic is interchanged. It has a physical connection with the Pennsylvania Railroad at Youngstown through which freight traffic is regularly interchanged. It also has a physical connection with the Lake Erie & Eastern Railroad, which is a subsidiary company of the New York Central system. Traffic is regularly interchanged through that interchange also.

Commissioner Schaber: Is that at Youngstown?
The witness: That is at Youngstown.

Q. Is the Youngstown & Suburban's participation in joint through freight rates a recent matter or has it existed for any considerable length of time?

A. It has existed since the first of June, 1931.

Q. Now will you describe likewise the Pittsburgh, Lisbon & Western?

A. The Pittsburgh, Lisbon & Western is a steam railroad, incorporated in both the states of Ohio and Pennsylvania. It extends from New Gallilee, Pennsylvania, a point in Beaver County, where it connects with the Pennsylvania Railroad Company, west to the city of Lisbon, in Columbiana County, Ohio, where it has a physical connection for the interchange of traffic with the Erie Railroad.

[fol. 158] Q. Other than these connections which you have mentioned with the Pennsylvania, the Erie, and the connection with the Youngstown & Suburban, does the Lisbon have any physical connection with any other common carrier railroad?

A. No, those three are all of the physical connections they have with other common carriers.

Commissioner Schaber: It connects with the Pennsylvania——

The Witness: At New Gallilee, Pennsylvania. That is on the east end.

Commissioner Schaber: At the east end, and with the Erie at the west end?

The Witness: With the Erie at the west end.

Commissioner Schaber: And also with the——

The Witness: With the Youngstown & Surburban close to the center of the line at Signal. The connection with the Youngstown & Suburban is at Signal, Ohio.

Commissioner Schaber: And Signal is where in reference to Lisbon?

The Witness: That is approximately 9 miles east of Lisbon.

By Mr. Gutheim:

Q. Now does the Youngstown & Suburban transport bituminous coal?

A. Yes, it does.

Q. And does it transport it purely locally alone or does it transport it also as a part of through routes?

A. It transports it locally and as a part of through routes. We have some coal which moves over the entire length of the line in both directions to and from connections at each end.

Q. Does it transport bituminous coal in through routes on joint rates in connection with the Pittsburgh, Lisbon & Western?

A. Yes.

[fol. 159] Q. And do you have rates applicable to the transportation of bituminous coal from Pittsburgh, Lisbon & Western points to destinations on the Youngstown & Suburban?

A. We do.

Q. Do those origin points include Negley, Ohio?

A. They do.

Q. Do the destination points include Youngstown?

A. Yes.

Q. And do the destination points include in Youngstown not only those locally on the Youngstown & Suburban but those on certain of its connections to be reached through switching charges and absorption of the same?

A. They do.

Q. Do you currently handle bituminous coal now locally on the Y. & S. and from Signal on the Y. & S. to destinations north thereof when the coal originates on the Lisbon Railroad?

A. Yes, we do.

Examiner Herrold: Allow me to ask a question there. Do you have any joint rates applicable to coal from points on the Pittsburgh Lisbon & Western Railroad or from points on the Y. & S. that apply to destinations beyond Youngstown through Youngstown as the junction point?

The Witness: We have joint rates on coal from trunk line origins through the Y. & S. to destinations on the Pittsburgh Lisbon & Western but we have no joint rates on coal from origins on the P. L. & W. through the Y. & S. and through the Youngstown interchange to destinations other than in the city of Youngstown on trunk lines. We have endeavored to get those rates established and we have been refused.

Examiner Herrold: So the only rates that you have now——

The Witness: Coal can move into the Y. & S. and through the Y. & S. to the P. L. & W. on regularly established rates but it can't move in the reverse direction.

[fol. 160] By Examiner Herrold:

Q. So the only rates you have now that would be applicable to coal from Negley, say, or from any other point on the P. L. & W. or the Y. & S. into Youngstown are switching rates at Youngstown?

A. That is right.

Q. And they are limited, those rates are limited to only two carriers, isn't that correct?

A. They are limited to deliveries on the Erie Railroad.

Mr. Day: I think there is a misunderstanding. I wonder if the reporter will go back and read the question of yours before the last one?

(Previous question and answer read as follows: "Q. By Examiner Herrold: So the only rates you have now that would be applicable to coal from Negley, say, or from any other point on the P. L. & W. or the Y. & S. into Youngstown are switching rates at Youngstown?" Answer, "That is right".)

Mr. Day: You meant in connection with the Y. & S., Mr. Fowler, didn't you?

The Witness: I can explain it. The answer to that question should be the only through rates on coal off the P. L. & W. by way of the Y. & S. are to Youngstown, at which point this coal is handled by certain of the trunk lines on a switching rate. Does that clear it up, Mr. Day?

Mr. Day: Yes. The way—that is, your answer covers as far as you go, Mr. Fowler, but the——

Commissioner Schaber: Well, you will have a chance to cross examine him.

Mr. Day: He asked me if his answer covered it. I was trying to explain to him that I didn't think it did adequately cover the situation.

[fol. 161] By Mr. Gutheim:

Q. How long, Mr. Fowler, have the rates been in effect on bituminous coal from Negley to Youngstown for Youngstown & Suburban delivery and how long for deliveries beyond the Youngstown & Suburban to destinations on other lines in Youngstown?

A. They have been in effect for deliveries to points on the Youngstown & Suburban since some time in the Fall of 1930. I can't give you the exact date without reference to the tariff. They have been in effect to points in Youngstown on the trunk lines since June, 1931.

Examiner Herrold: I might ask you, you mean for deliveries on the Erie Railroad?

The Witness: Yes.

Examiner Herrold: In Youngstown, by the use of the Pennsylvania Railroad as an intermediate switching carrier?

The Witness: That is right. And up to about a year ago they were in effect for deliveries on the Baltimore & Ohio Railroad.

Q. Now Mr. Fowler, have you transported coal during the past couple of months from Negley to Youngstown via the P. L. & W. and the Y. & S.?

A. We have.

Q. Have you the original transportation documents upon which that coal was transported?

A. I have.

Q. I would like to have you take the instance of the first carload of coal that was so transported and state what the facts of transportation are from the delivery of the car by the P. L. & W. empty for loading and the final delivery of the car by you, that is, by the Youngstown & Suburban toward destination.

A. Shall I follow the movement with just one car?

Q. Take one car, first car and follow the movement through. I suggest that if you will hand me the original document and one copy in each case the Commissioner and [fol. 162] the Examiner can peruse the same and then let the gentlemen on the other side have their copies and we will ask them if the copies can be put into the record and the original taken back by Mr. Fowler because they are parts of his official files.

Commissioner Schaber: I see no objection to that.

Examiner Herrold: You want to introduce it as an exhibit?

Mr. Gutheim: I will ask that this first one, which is headed "The Pittsburgh, Lisbon & Western Railroad Company, conductor's wheelage report" be marked for identification as Exhibit 1.

Examiner Herrold: It may be so marked, Fowler's Exhibit 1.

And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler's Exhibit 1.

Commissioner Schaber: You might exhibit the original to opposite counsel and then just have the copy put in the record.

Mr. Gutheim: I ask that there be marked for identification as Fowler's Exhibit No. 2 shipping order dated Negley, Ohio, September 17, 1934, covering C. C. C. & St. L. car number 79,123.

Examiner Herrold: It may be marked as Fowler Exhibit No. 2.

And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 2.

Mr. Gutheim: I ask that there be marked for identification as Exhibit No. 3, document headed "The Pittsburgh, Lisbon & Western Railroad Company, Freight Waybill covering C. C. C. & St. L. car 79,123", and I exhibit the [fol. 163] original to Your Honor and I will pass it to counsel on the other side.

Examiner Herrold: It may be marked Fowler Exhibit No. 3.

And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 3.

Mr. Orcutt: This exhibit number 2, I understand, was Big Four car 79,123, is that right, Mr. Gutheim?

Mr. Gutheim: Yes.

Mr. Orcutt: Did you have the original bill of lading for that? This purports to be a copy and some erasures on it and some things crossed out.

Mr. Gutheim: The original bill of lading is in the possession of the shipper and this is the shipping order that they delivered to us with instructions for shipment. A copy of that is the receipt that——

Mr. Orcutt: Can you state what has been erased from the face of that? I can't make it out.

The Witness: The erasure is 80 capacity car ordered, a hundred capacity car furnished.

Mr. Orcutt: Yes, but above that there is an erasure. What you have just read has been crossed out.

The Witness: That is not an erasure. That is evidently a transfer from the carbon over. As I read it it says 80 thousand capacity car ordered, 110 thousand capacity car furnished. It is just a transfer from another writing.

Q. Now what is the next document in the order of transportation, Mr. Fowler?

[fol. 164] A. Conductor's wheelage report of the P. L. & W.

Commissioner Schaber: May I ask what that date is on Fowler Exhibit 2, is that September 17 or 27? On exhibit 3 it is September 17 and on exhibit 2 it isn't clear to me whether that is 17 or 27.

Mr. Gutheim: This is a better copy, Mr. Commissioner.

Commissioner Schaber: That is all right. I understand it now.

Mr. Gutheim: I ask that there be marked as Exhibit 4 document headed "The Pittsburgh, Lisbon & Western Railroad Company, conductor's wheelage report", being of two sheets and covering train number Ext. 17, direction west, September 17, 1934, and I exhibit the original to Your Honors and will offer it for examination also by the defendants.

Examiner Herrold: It may be marked Fowler's Exhibit No. 4.

And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 4.

Q. Now Mr. Fowler, will you find the next document evidencing the transportation?

A. Next document is interchange report, P. L. & W. to Y. & S.

Mr. Gutheim: I ask that there be marked for identification as Fowler Exhibit No. 5, document headed "The Pittsburgh Lisbon & Western Railroad Company, daily interchange report of cars from P. L. & W. Railroad Company to Y. & S. R. R. at Signal, Ohio, date, September 18, 1934."

Examiner Herrold: It may be so marked.

[fol. 165] And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 5.

Mr. Gutheim: And I offer this original to the Commission and I offer it also to counsel on the other side. It might be well if I would have Mr. Fowler explain the circumstances under which this original happens to be a carbon copy.

The Witness: The first copy of the interchange report, that is, the original of the interchange report is made in a cut up sheet, the sheet is cut into strips and those strips designating the company which owns the cars and those small sections are sent to the accounting department or the car record office of the company which owns the car so that they can keep a record on the car, the original thus being out of our possession entirely and cut into numerous strips.

Q. And does this carbon which has been offered here, constitute now your original record?

A. That is our original record of the interchange.

Q. What is the next document, Mr. Fowler?

A. The next document is the conductor's wheelage report of the Youngstown & Suburban Railway Company.

Mr. Gutheim: I offer as Fowler's Exhibit No. 6 document headed "The Youngstown & Suburban Railway Company, conductor's wheelage report, date September 18-19, 1934", and submit the original for inspection.

Examiner Herrold: It may be so marked.

And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 6.

[fol. 166] Mr. Gutheim: And I offer as Number 7 for identification document headed "Daily interchange report of cars from the Youngstown & Suburban Ry. Co. to Pennsylvania Railroad at Yo. Ohio, September 19, 1934, and submit the original for inspection.

Examiner Herrold: It may be marked Fowler Exhibit No. 7.

And thereupon the paper writing last above referred to is marked for purposes of identification as Fowler Exhibit No. 7.

Q. Mr. Fowler, I observe that this Exhibit number 7 is also a carbon copy and would like to ask, therefore, if the circumstances under which you present this as the original in your files are the same as what you previously stated with respect to the interchange report of the P. L. & W. to the Y. & S.?

A. They are. The same thing applies. The original has been cut up and sent to different railroad companies.

Q. What is the next transportation document you have?

A. Next transportation document is the interline switching waybill which should cover the delivery of the car from our interchange to final destination. The original of this document is in the bill box on our interchange track and theoretically out of our possession. That original goes with the car. The conductor that picks up the car takes that original and turns it in to his company. However I have a carbon copy of that original with me which constitutes our original document as far as our company is concerned.

Q. That is this is a copy of such record as you have in your files?

A. That is our file record.

Mr. Gutheim: I offer that as number 8 for identification.

[fol. 167] And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 8.

Q. To make sure of this point, as I understand it the original document in the customery method of interchanging freight is placed by the Youngstown & Suburban in the bill box at the interchange track to the P. R. R. at Youngstown?

A. That is right.

Q. And it is there now?

A. That is right.

Q. Are there any further documents evidencing this particular transportation, Mr. Fowler, of this particular car?

A. No, that is all of the documents covering the movement.

Q. Now will you take these documents beginning with exhibit 1 and explain to the Commission just how the transportation is evidenced thereon?

A. Exhibit number 1 is the conductor's wheelage report on the Pittsburgh, Lisbon & Western Railroad Company covering movement of all cars by extra 16 on September 14, 1934. Following down this exhibit to line 21 we find C. C. C. & St. L. car 79,123 designated as a hopper car, which was picked up at number 40, which is the station number.

Commissioner Schaber: Picked up where?

The Witness: Picked up at number 40.

Mr. Gutheim: "Taken at" is the column.

The Witness: Number 40, which is the station number for the point at which this car was empty, and it was left at 54, which is designated in our list as the West Darlington clay spur track.

Commissioner Schaber: That is, in other words, it moved from station 40 to station 54 as an empty car?

The Witness: That is right. Now that covers the placing of that empty car on the West Darlington clay spur track for the Pittsburgh Coal Company in response to an order [fol. 168] which they gave our agent at Negley for an empty coal car.

Commissioner Schaber: Now station 54 or stop 54, that is Negley?

The Witness: That is the spur track, what we call the West Darlington clay spur track at Negley, Ohio. The end of that spur track connects with the private track of the Pittsburgh Coal Company at Negley.

Commissioner Schaber: And where is 40?

The Witness: 40 is the siding of the West Darlington Fireproofing Company at West Darlington. That particular car had been placed in there loaded with limestone and when it was unloaded and made empty it was taken to Negley and placed on the track of the Pittsburgh Coal Company for coal loading.

Commissioner Schaber: And where is West Darlington?

The Witness: West Darlington is a point about four miles east of Negley in Pennsylvania.

Commissioner Schaber: It is in Pennsylvania?

The Witness: Yes.

Commissioner Schaber: Negley is in Ohio?

The Witness: Yes. The Pittsburgh Coal Company track on which we place empties for them connects with the end of the West Darlington clay spur track. That covers the placing of that empty car for loading with coal by the Pittsburgh Coal Company.

Q. Now will you go on with your explanation of the transportation of the next exhibit?

A. Exhibit number 2 is the shipping order furnished to us by the Pittsburgh Coal Company.

Mr. Fitzpatrick: Excuse the interruption, please, Mr. Fowler, you used "us".

[fol. 169] The Witness: Furnished to the Pittsburgh, Lisbon & Western Railroad Company. To covers the movement of C. C. C. & St. L. No. 79,123 from Negley, Ohio, to the consignee, the Youngstown Ice Company, Haselton Yard in the city of Youngstown, Ohio. The exhibit shows that the car contained furnace coal and was routed by way of P. L. & W., Y. & S. for Erie delivery.

Commissioner Schaber: This says the car was received from Mine 30, Pittsburgh Coal Company. What does that indicate to you, Mine 30?

The Witness: Well, as I understand it, all of the Pittsburgh Coal Company's mines are designated by a number, all of their plants are designated by a number for accounting purposes and billing purposes. This Mine 30 is the number which they have assigned to this Negley plant.

Commissioner Schaber: There is actually no mine there, is there?

The Witness: Not at this plant, no.

By Mr. Gutheim:

Q. Now after receiving this shipping order, exhibit number 2, Mr. Fowler, what is the next evidence of the transportation?

A. The next step as far as transportation is concerned is to make out a waybill, which is used solely by the railroad companies to cover the movement of that particular car to destination.

Commissioner Schaber: Just before you go further there, where was this car from September 14 to September 17th?

The Witness: It was in the possession of the Pittsburgh Coal Company and evidently at their plant awaiting loading.

Commissioner Schaber: All right. Excuse the interruption there.

[fol. 170] Mr. Gutheim: That is all right.

The Witness: Exhibit number 3 is the freight waybill which goes along with the car and covers the movement of the car through the various interchanges to destination. This waybill covers C. C. C. & St. L. Car 79,123, shows the car to be loaded with furnace coal and consigned to the Youngstown Ice Company, Haselton Yard, Youngstown, Ohio, Erie Railroad delivery, with the shipper, the Pittsburgh Coal Company and the origin Negley, Ohio.

Examiner Herrold: This Haselton yard that you mentioned, where is that located?

The Witness: Haselton Yard is located in the eastern part of Youngstown in what is known as East Youngstown and is a designation that the Youngstown Ice Company use for that particular plant, they having three or four plants scattered throughout the city.

Examiner Herrold: They have a private track there upon which they take delivery?

The Witness: They do.

Examiner Herrold: You have Haselton spelled on the bill of lading or copy of the bill of lading H-a-s-e-l-t-o-n, and on the waybill it is spelled H-a-z-e-l-t-o-n. I suppose it is the same place?

The Witness: It is the same place. The spelling of that word is used both ways.

By Mr. Gutheim:

Q. It is not intended to mean the Haselton Yard of the Pennsylvania Railroad?

A. No, it is the Haselton Yard or the Haselton plant of the Youngstown Ice Company. It has nothing to do with the railroad yard.

Mr. Orcutt: What does the "E" mean just preceding the weight on your exhibit 3?

[fol. 171] The Witness: "E", that means an estimated weight.

Examiner Herrold: Have these cars ever been weighed?

The Witness: No, these cars were all moved under an estimated weight.

Examiner Herrold: Is that provided for in the tariff?

The Witness: Well, I can't answer that exactly but I presume it is.

By Mr. Gutheim:

Q. Now will you take up your next document and explain that?

A. The next document is the conductor's wheelage report of the conductor of the Pittsburgh, Lisbon & Western Railroad for the movement of all cars handled by Extra 17 on September 17, 1934. Going down to line 26 we find Big Four car 79,123, Big Four being the designation for C. C. C. & St. L., hopper car loaded with coal taken at 54, which is the West Darlington clay spur, and left at 174, which is the P. L. & W.-Y. & S. interchange track at Signal, Ohio. That covers the picking up of the car of coal at its origin at Negley, Ohio, and the transportation of it over the P. L. & W. to the Y. & S. Railway interchange track.

Examiner Herrold: Well, you mentioned West Darlington siding. Are we to understand that that is the siding of the Pittsburgh Coal Company plant?

The Witness: That is right.

Commissioner Schaber: I thought you said that was station 40 a moment ago.

The Witness: Station 40 is the siding of the Darlington Fireproofing Company at which this car was originally made empty.

Mr. Gutheim: I think, Mr. Commissioner, that you may be embarrassed somewhat by the fact that the car was made empty at the Darlington plant but was placed empty at the [fol. 172] West Darlington spur. Now those are two different things.

Commissioner Schaber: That is clear now.

Examiner Herrold: Well now let me see, is the West Darlington spur the same thing as the private track of the Pittsburgh Coal Company upon which their plant is located?

The Witness: The end of the West Darlington spur connects directly with the private track of the Pittsburgh Coal Company.

Examiner Herrold: Number 54 is the private track then of the Pittsburgh Coal Company upon which its plant is located?

The Witness: Well, it is the track which connects with that track. The West Darlington spur has two industries connected to it, one of them being the Pittsburgh Coal Company's tracks.

Examiner Herrold: Well, that explains it.

By Mr. Gutheim:

Q. Now will you take up the next evidence of the transportation, Mr. Fowler, having gotten the car to Signal?

A. The next is the exhibit which has been designated as number 5. That shows in the second line Big Four 79,123, hopper car, delivered by the P. L. & W. Railroad Company to the Y. & S. at Signal, Ohio, at 11 P. M. on September 18 with the final destination Youngstown, Ohio, contents, coal.

Q. That puts the car in the possession of the Youngstown & Suburban?

A. That turns the car over to the Youngstown & Suburban for further transportation.

Q. Now what is your evidence of the next further transportation?

A. Next is what has been designated as exhibit number 6, which is the conductor's wheelage report showing the movement of all cars by locomotive 100 on September — two dates — September 18, 1934. Following down the number of cars to line 6 we find Big Four car 79,123, designated [fol. 173] as a hopper car containing coal, 50 tons, taken at siding 174, which is the interchange track between P. L. & W. and the Y. & S., and left at siding 15, which is the designation for the Y. & S.-P. R. R. interchange track at Youngstown, Ohio, shows that that car was placed on that track at 1:02 A. M. on September 19th, this wheelage report covering the movement during the night of September 18th and 19th.

Q. Now take up the next further document evidencing transportation.

A. The next document has been designated as exhibit number 7 and is the daily interchange report of cars from the Youngstown & Suburban Railway Company to the Pennsylvania Railroad Company at Youngstown, Ohio, on September 19th, 1934. In the fourth line we find Big Four

79,123, under the loaded column, hopper car, delivered by the Y. & S. Railway Company at 1:02 A. M. for final destination on the Erie Railroad, contents of the car being designated as coal.

Q. Now will you explain the last of the documents covering this car, the interline switching waybill of the Y. & S.?

A. This daily interchange report, exhibit number 7, turns the car over to the possession of the Pennsylvania Railroad. Exhibit number 8, Youngstown & Suburban Railway Company interline switching waybill, is the bill which covers the switching movement of the car to final destination from the Y. & S.-P. R. R. interchange track. That shows that the shipper of this car of coal was the Pittsburgh Coal Company, the original point of shipment Negley, Ohio, the consignee is the Youngstown Ice Company located at Youngstown, Ohio. Contents of the car are furnace coal. Weight, 100,000 pounds. The car is to be delivered under this switching waybill at final destination by the Erie Railroad Company.

[fol. 174] Q. Now, Mr. Fowler, there are mentioned in the complaint four other instances of transportation of coal from Negley to Youngstown for delivery to consignees on the Erie, the other three being M. C. car 10,990, P. & L. E. car 50,767, C. C. C. & St. L. car 82,713. Except insofar as these cars or the transportation of them by the Lisbon and the Youngstown & Suburban and their delivery to the Pennsylvania is evidenced on documents already submitted, have you the other documents which cover those cars?

A. I have.

Mr. Gutheim: I suggest, Your Honor, that if you can suspend for a few moments we can assemble the documents successively for each of the other three cars and offer them with one batch for each and it may simplify matters considerably.

Commissioner Schaber: Yes. Well, it is nearly the noon hour. We might adjourn until after lunch hour.

And thereupon the recess was taken until 1:15 o'clock P. M. of the same day.

[fol. 175] Wednesday Afternoon Session,
October 17, 1934.

And also, WILLIAM E. FOWLER, resuming the stand, continued his testimony as follows:

Examined by Mr. Gutheim:

Mr. Gutheim: It may be helpful for the Commission if I will make a statement with respect to the balance of these transportation documents. The further documents that I will introduce will cover the three additional cars, the movement of which is pleaded in the complaint, but it so happens that in many instances the transportation of all four cars went along together and that the four cars appear on documents that have already been introduced. Therefore I will only introduce the additional documents which are necessary and I will specify them accordingly.

Q. Mr. Fowler, have you the original document that evidences the transportation of the empty cars to the Pittsburgh Coal Company's track at Negley, which cars were subsequently loaded for delivery to Youngstown on the Erie Railroad?

A. I have the wheelage report that shows that placement.

Commissioner Schaber: What particular car is that?

Mr. Gutheim: I will recite that. I offer for identification as exhibit number 9 document headed "The Pittsburgh Lisbon & Western Railroad Company, conductor's wheelage report, covering Extra west train number 16, September 13, 1934", and showing the movement of M. C. Car 10,990, C. C. C. & St. L. car 82,713, and P. & L. E. car 50,767, and I submit the original and will furnish copies.

[fol. 176] And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 9.

Q. Mr. Fowler, have you the original shipping order delivered to the Pittsburgh Lisbon & Western by the Pittsburgh Coal Company covering M. C. Car 10,990, and is this the document that I hand you?

A. That is.

Mr. Gutheim: I offer that as number 10 for identification and submit the original.

And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 10.

Mr. Fitzpatrick: May I understand, will copies be offered?

Mr. Gutheim: Yes, but we have got these assembled and we will pass them over in a moment.

Mr. Fitzpatrick: Excuse me.

Q. I show you document headed "The Pittsburgh Lisbon & Western Railway Company; Freight Waybill C-1," covering M. C. car 10,990, and ask you if that is the original waybill upon which that car moved to Youngstown?

A. It is.

Q. And I hand you also Youngstown & Suburban Railway Company interline switching waybill, September 18, 1934, at Youngstown, Ohio, station, covering M. C. car 10,990, and ask you if that is the copy of the original bill that is in the bill box of the Pennsylvania.

A. It is.

Q. Covering that same car?

A. Right.

Mr. Gutheim: I ask that the waybill be marked for identification number 11 and that the transfer bill at Youngs- [fol. 177] town be marked number 12. I will submit all of the originals and mark the copies with the same numbers.

And thereupon the paper writings last above referred to were marked for the purpose of identification as Fowler Exhibits Nos. 11 and 12, respectively.

Q. Now Mr. Fowler, I show you a document headed "The Pittsburgh Lisbon & Western Railway Company, Negley, Ohio, September 17, 1934", and being shipping order for C. C. C. & St. L. car 82,713, and ask you if that is the original document delivered to you by the Pittsburgh Coal Company.

A. It is.

Mr. Gutheim: I ask that be marked for identification number 13.

And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 13.

Q. I also show you waybill covering the same car from Negley to Youngstown. Is that the original?

A. It is.

Mr. Gutheim: I ask that that be marked for identification number 14.

And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 14.

Q. I also show you interline switching waybill at Youngstown covering the same car. Is that the original document [fol. 178] in your file?

A. It is.

Q. The bill itself being in the bill box?

A. That is right.

Mr. Gutheim: I ask that that be marked 15.

And thereupon the document last above referred to was marked for purposes of identification as Fowler Exhibit No. 15.

Mr. Gutheim: I submit the originals, Your Honor, for the inspection of the opposing side.

Q. Next I show you, Mr. Fowler, shipping order dated Negley, Ohio, September 17th, and covering P. & L. E. car 50767 and ask you if that is the original delivered to you by the Pittsburgh Coal Company?

A. It is.

Mr. Gutheim: I ask that that be marked for identification number 16.

And thereupon the document last above referred to was marked for the purpose of identification as Fowler Exhibit No. 16.

Q. I show you next waybill from Negley to Youngstown covering the same car, P. & L. E. 50767, and ask if that is the original.

A. It is.

Mr. Gutheim: I ask that that be marked number 17.

And thereupon the paper writing last above referred to was marked for the purpose of identification as Fowler Exhibit No. 17.

Q. I show you next interline switching waybill at Youngstown covering the same car, P. & L. E. 50767. Is that your original record?

[fol. 179] A. It is.

Q. The original bill itself being in the bill box?

A. That is right.

Mr. Gutheim: I ask that that be marked number 18 and I submit the three originals for your inspection.

And thereupon the paper writing last above referred to was marked for identification as Fowler Exhibit No. 18.

Mr. Fitzpatrick: Do I have this correct, Big Four 82713 bill of lading is exhibit 13?

Mr. Gutheim: You mean the number?

Mr. Fitzpatrick: Yes.

Mr. Gutheim: That is exhibit number 13, the waybill is 14 and the transfer bill is 15.

Q. Mr. Fowler, do these documents that have now been identified from exhibit number 10 on complete the evidence of the transportation of the other three cars except insofar as that transportation is evidenced on the documents 1 to 9?

A. Yes, sir.

Mr. Gutheim: I ask that all of these exhibits marked for identification thus far to evidence this transportation from Negley to Youngstown be received in evidence, Mr. Commissioner.

Commissioner Schaber: Do you desire to cross examine on the exhibits on any point?

Mr. Orcutt: On these points? There are one or two questions I had.

Mr. Gutheim: Well, before the cross examination begins, Mr. Commissioner, there is some more evidence in chief.

Mr. Orcutt: I understood this was just to clear up these [fol. 180] exhibits. The main cross examination on them will come later.

Commissioner Schaber: Yes, just on these exhibits before we rule on the admissibility of them.

By Mr. Orcutt:

Q. Have you got the original number 18?

A. Yes.

Q. Who made this copy?

A. Well that copy was made when the——

Q. I want the record to show that Mr. Fowler now has in his hands original exhibit number 18.

A. I don't understand your question, Mr. Orcutt.

Q. Who made the copy, who typed them, who filled it out?

A. The agent at Youngstown.

Q. And where did you get it?

A. I got it from the agent.

Q. And is that now identical with the copy that was given to you? Has it been changed any in your possession?

A. No.

Q. Who put in the pencil figures there?

A. I can't say who put those pencil figures in.

Q. Those have been put in since the original was made, now, haven't they?

A. Yes.

Q. And they don't appear upon the copies furnished to defendants in any instance?

A. No.

Mr. Orcutt: Let the record show, if the Commissioner please, I am referring to the pencil figures on the original under the heading "Switching charges" in the column under "Amount" marked "Prepaid".

Mr. Day: How did you ascertain that, Mr. Orcutt?

Commissioner Schaber: Those figures do not appear on the copies of that exhibit.

Mr. Orcutt: This is the original and someone has inserted those in pencil and the defendants submit that those did not appear upon the originals submitted to any of the defendants herein or put into any box at Youngstown. They [fol. 181] have been put in since for some purpose.

Commissioner Schaber: Do you claim anything for those figures, Mr. Gutheim?

Mr. Gutheim: I don't claim anything for the figures, no, sir.

Mr. Orcutt: Suppose you eliminate them then. They are in pencil and the rest of the exhibit is in type. They were inserted by somebody for some purpose. If they don't mean anything, let them go out.

By Mr. Gutheim:

Q. Do you know what the circumstances under which those figures were inserted or why, Mr. Fowler?

A. Well in making a switching waybill it is very customary to insert the switching charges on them, most of them are made up in skeleton form and the agent takes his copy and enters those switching figures for his accounting records. We get hundreds of switching waybills which have no switching charges entered on them but they are later entered on by the agent and an accounting made.

Mr. Orcutt: Well my point is that this is submitted to this Commission as the original of some paper that was submitted to the Pennsylvania Railroad Company. Now the defendants insist those pencil figures were put in later. If you make no point of it and are willing to admit that that exhibit without those pencil figures is the correct copy, well then we are satisfied.

Commissioner Schaber: Well, they claim nothing for the figures, so they will be disregarded as far as any consideration to be given to them.

Mr. Orcutt: Well they should be eliminated, if the Commission please.

Commissioner Schaber: These copies that go into the [fol. 182] record have no reference to the figures on there. They apparently are eliminated as far as the record here is concerned.

Mr. Orcutt: That is satisfactory.

Mr. Fitzpatrick: I suppose, Mr. Commissioner, we can cross examine on those exhibits at the regular time?

Commissioner Schaber: Oh yes. I just thought possibly you wanted to examine as to the correctness of these exhibits and copies and so on before I ruled on their admissibility. That is all.

Mr. Orcutt: I haven't any further questions.

Commissioner Schaber: Well they may be admitted.

And thereupon the paper writings heretofore identified were offered, introduced and admitted in evidence on behalf of the Complainant, and are herewith submitted, marked Fowler Exhibits Numbers 1 to 18 inclusive.

By Mr. Gutheim:

Q. Mr. Fowler, are these four cars, the transportation documents covering which are now of record here, still standing on the Y. & S.-P. R. R. interchange in Youngstown?

A. They are.

Q. Have they been there continuously since they were first so placed?

A. They have, yes.

Q. Were they delivered on that interchange for the P. R. R. in the usual and customary manner in which all freight cars for interchange to the P. R. R. are delivered?

A. They were.

Q. At the time the original delivery was made the transfer bills were placed in the bill box?

A. They were.

Q. Are they still there so far as you are aware?

A. So far as I know they are still there.

[fol. 183] Commissioner Schaber: Is that the customary practice?

The Witness: The customary practice was followed in every respect.

Commissioner Schaber: No further notice is required other than to put this switching waybill in the box?

The Witness: Well there is always—our dispatcher or the Pennsylvania yardmaster, as the case may be, always call each other and tell each other what they expect to put on the interchange from one to the other. In our case these particular cars, the Pennsylvania yardmaster was notified several hours before they were put on the interchange that they would be placed there so that he would have time to instruct his crew as to the movement.

Examiner Herrold: But it is your contention that the actual placing of the cars on the interchange track and the placing of the switching waybill in the box constitutes the real delivery?

The Witness: That is right.

By Mr. Gutheim:

Q. Have you had any information or advice from the Pennsylvania with respect to their failure to move the cars?

A. The only information and advice we have had is through the yardmaster who has told our dispatcher that he was instructed not to handle these cars.

Q. Have you since the cars were placed by you on the Y. & S.-P. R. R. interchange track been served with any notice from the Pennsylvania Railroad with respect to prepayment of charges on coal from the Youngstown & Suburban?

A. On September 22nd we received such a notice.

Q. And will you read the notice into the record?

A. That notice is headed "Pennsylvania Railroad Company. Notice of Prepayment. September 18, 1934." It [fol. 184] reads as follows:

"Effective at once this company will not accept shipments of bituminous coal carloads from the Youngstown & Suburban Railway at its interchange in Youngstown for delivery to individuals or industries on its own or connecting lines within the switching limits of Youngstown which do not originate at mines within the state of Ohio until all charges from its connection with the Youngstown & Suburban Railway to point of ultimate delivery are fully prepaid at rates published in tariffs on file with the Interstate Commerce Commission."

Signed in typewriter by J. B. McCorkle, General Freight Agent. That notice was received by us on September 22nd.

Q. What did you do on the receipt of that notice so far as these particular four cars of coal were concerned?

A. We made a tender to the agent of the Pennsylvania Railroad at Youngstown of the lawful switching charges——

Mr. Orcutt: I object.

Commissioner Schaber: Let him say what he did.

Mr. Orcutt: Let him say what he did and not offer an opinion as to the legality of what he did.

Commissioner Schaber: Oh, tell what you did.

The Witness: We made an offer to the agent of the Pennsylvania Railroad of what we considered to be the switching charges on these four cars of coal. That offer consisted of tendering to him in lawful money $30.60, which covered what we believed to be the switching charges on these four cars.

Q. Now will you state how you computed the amount so far as the rates are concerned?

A. Those amounts were computed from tariffs published by the Pennsylvania Railroad Company and the Erie Rail- [fol. 185] road Company. The Pennsylvania Railroad tariff number 134-C, Ohio 220, I. C. C. 1,207, names a rate of $2.70 per car between the Y. & S.-P. R. R. interchange and its connection with the Erie Railroad.

Mr. Orcutt: While he is right there on that particular tariff, may I ask him if he examined the provision for prepayment of charges in that same tariff to which he is referring?

The Witness: I did.

Q. Go ahead, Mr. Fowler.

A. Erie freight tariff No. 423-C, Ohio 2508, I. C. C. A-6815, names a rate of $4.95 per car from its connection with the Pennsylvania Railroad to the plant of the Republic Rubber Company and also to the Haselton yard of the Youngstown Ice Company.

Q. Those being the named consignees of the four cars?

A. That is right.

Mr. Orcutt: May I ask in connection with that tariff if he observed the prepay rules on page 67 of that same tariff?

The Witness: I don't know that I specifically read those prepay rules, no.

Q. Are there any provisions in the effective tariffs under which, Mr. Fowler, the Youngstown & Suburban would absorb the two switching charges of the Pennsylvania and the Erie to which you have so referred?

A. Youngstown & Suburban Railway tariffs, Ohio No. 100, I. C. C. 18, is an absorption tariff which provides for the absorption of switching charges of connecting lines up to 19 cents per ton.

Mr. Orcutt: Is that tariff filed with the Interstate Commerce Commission likewise?

The Witness: It is.

[fol. 186] Q. And while you are on this subject of rates will you give the tariff reference under which you assessed charges from Negley to Youngstown?

A. Joint freight tariff of the Youngstown & Suburban Railway Company between stations on the Youngstown & Suburban Railway and stations on the Pittsburgh Lisbon & Western Railroad Company via Signal, Ohio, Y. & S. Ohio number 96, I. C. C. number 16, P. L. & W. Ohio number 674, names a rate of 60 cents per ton on bituminous coal between stations on the Pittsburgh Lisbon & Western Railroad and stations on the Youngstown & Suburban Railway.

Mr. Day: That tariff also is filed with the Interstate Commerce Commission?

The Witness: Yes.

Q. Now when you so tendered payment of the switching charges of the Pennsylvania and the Erie in the manner you have described, was the payment accepted?

A. It was not.

Q. Did the Pennsylvania thereafter move the cars in accordance with the billing instructions?

A. No.

Q. Where are the cars today?

A. The cars are standing on the Y. & S.-P. R. R. interchange track at Youngstown.

Q. And where are the transfer bills today?

A. They are in the bill box adjacent to the Y. & S.-P. R. R. interchange track at Youngstown.

Q. Mr. Fowler, have you at any time been apprised of the position of the Erie Railroad with respect to whether or not it would move these cars if delivered to it by the Pennsylvania Railroad?

A. I have been advised by the Division Freight Agent's office of the Erie Railroad at Youngstown that it would not be necessary for them to refuse to move this coal because the Pennsylvania wouldn't move it to them, but if it were [fol. 187] moved to them, why, they would have to refuse to move it on the switching rates which I have named.

Mr. Gutheim: Now, if Your Honor please, that would ordinarily complete our presentation and I take the position that the evidence showing, as it does, that the locality of this transportation is entirely Ohio, then the obligation to prove that it is anything other than Ohio intra-state traffic is on the party who asserts that to be the fact and that there is no obligation upon this complainant to prove anything further than what we have already proved.

And as authority for the proposition that the obligation is on he who asserts that it is other than Ohio state traffic to prove that fact, I would cite the Knight case, 192 U. S. page 21, correct citation being the New York ex rel Pennsylvania R. Co. versus Knight.

Also Co. versus Arrow, 116 U. S. 517.

Also Campbell River Mills Company versus Chicago & St. P. R. R. Co., 42 F. Second, 775. That decision of the

District Court, I may say, was affirmed in 53 F. Second, 69, and certiorari was denied by the United States Supreme Court in 285 U. S. 536.

Now, to go further, as I understood Mr. Orcutt this morning, he took the position that if the burden were placed upon him to make any such proof to the effect that these cars were actually handled in interstate commerce he would ask for an adjournment to prepare evidence. Now without recognizing that there is any obligation whatever on the complainant to prove that this is anything other than intrastate commerce, we are perfectly willing, if Your Honor desires, out of deference to the Commission, to ask Mr. Morrow, the president of the Pittsburgh Coal Company, which is the shipper of these cars, to appear as a witness [fol. 188] and to state such facts as Your Honor may require with respect to the actual transactions as a result of which these cars were shipped as they were shipped from Negley to Youngstown.

Commissioner Schaber: I think that would be of some importance and aid to the Commission in disposing of this question to have Mr. Morrow's testimony.

Mr. Gutheim: May we have about five minutes? Mr. Morrow has just come in.

Mr. Fowler: It may be that counsel desires to cross examine Mr. Fowler on some other point.

Mr. Orcutt: I see Mr. Morrow is here and in consideration of his time we are perfectly willing to withhold cross examination of Mr. Fowler until Mr. Morrow has been on the stand if Mr. Gutheim wishes.

Mr. Gutheim: Well, Mr. Morrow is here but I am sure now that he is here he will wait here and I think in the usual course we might go ahead with the cross examination of Mr. Fowler.

Mr. Orcutt: All right.

Cross-examination.

By Mr. Orcutt:

Q. Did I understand you to say, Mr. Fowler, that you were president of the Youngstown & Suburban Railway?

A. Yes, sir.

Q. And what position did you say you held with the Pittsburgh Lisbon & Western?

A. President also.

Q. And what position do you hold with the Montour Railway?

A. Vice president.

[fol. 189] Q. Those three railways are all owned, are they not, by the Pittsburgh Coal Company?

Mr. Gutheim: I object to that, Your Honor. We are not trying any question of intercorporate relationship here. Mr. Orcutt stated this morning that the only question is whether this commerce is interstate or intra-state commerce. We are not trying a commodities clause case and that is not relevant.

Commissioner Schaber: How is it relevant?

Mr. Orcutt: If the Commission please, the Complainant alleges that this coal was shipped by the Pittsburgh Coal Company. The Pittsburgh Coal Company owns the Pittsburgh Lisbon & Western and the Youngstown & Suburban, lock, stock and barrel. Now they moved it in a certain way that the Pittsburgh Coal Company wanted it to. They come in here now and say "All we know about it is that this was given to us at Negley". Under those circumstances I should think this Commission would certainly want to inquire as to the community of interest and the possible motive they could have in this procedure. It is of utmost importance.

Commissioner Schaber: I just don't see the relevancy of it at this time. I don't know as it is going to do any particular harm to let it go into the record. If it is not relevant we will disregard it.

Mr. Gutheim: Might I say, Your Honor——

Mr. Day: Let the witness answer the question first. We have had a ruling.

Commissioner Schaber: I will listen to Mr. Gutheim, I will listen to all of you.

Mr. Gutheim: All I want to say is that we have spent a year going all through this same proposition in the Eastern [fol. 190] District Court in Ohio, Federal Court, and all I am trying to avoid here is that we try again all of the points with respect to the ownership by the Pittsburgh Coal Company of the stock of these companies. There is nothing unlawful in that ownership.

Mr. Orcutt: I didn't impute anything unlawful.

Commissioner Schaber: I don't think it is offered with the intent of showing any unlawful relationship.

Mr. Orcutt: Not at all, Sir, and this was my only question. I don't intend to try that whole case.

Commissioner Schaber: We will permit him to answer.

(Previous question read.)

A. The Pittsburgh Coal Company owns the capital stock.

Q. Of the three companies?

A. Of the three companies. Not exclusively, however.

Q. By "not exclusively" I assume you mean with the exception of the qualifying shares for directors?

A. Yes, which in one case at least is owned absolutely by the directors.

Mr. Day: You mean by that, one railroad is owned by the directors?

The Witness: No, I don't mean that.

Q. Has the Youngstown & Suburban ever at any time used any steam locomotive power?

A. Yes, we have used steam locomotive power on the Youngstown & Suburban.

Q. Whose power was it?

A. Pittsburgh, Lisbon & Western.

Q. Is the Youngstown & Suburban equipped in its own right to use any steam power at all on its road?

A. Yes.

Q. All right, what steam locomotives have you?

A. Well if you mean equipment, do we have any steam locomotives, I would say no.

[fol. 191] Q. That certainly is what I meant when I asked if you were equipped.

A. You asked me if we were equipped to use any.

Q. Yes.

A. We are equipped to use steam locomotives.

Q. All right, what steam locomotives have you that you can use?

A. We can acquire steam locomotives at any time we want to by rental or by purchase or by arrangements with connecting lines to use them.

Q. But you are not now equipped with them?

A. We are not now equipped with steam locomotives of our own ownership.

Q. How many electric locomotives do you have?

A. One.

Q. Do you at any time use any street cars for power in moving freight?

A. Well we have a heavy line car which occasionally is used to move one or two cars in switching service.

Q. And when it is not doing that it carries passengers?

A. No.

Q. Is it a passenger car?

A. It is a line car, which means a line repair gang. We use no passenger cars for movement of freight.

Q. How many passenger cars do you have?

Mr. Gutheim: Now if Your Honor please, it doesn't seem to me that this is very material with respect to whether or not this is interstate.

Commissioner Schaber: Possibly not, but I think we can make headway by answering these questions.

Mr. Orcutt: I think, Your Honor, it is very material under the act which gives jurisdiction to this Commission.

Commissioner Schaber: All right, go ahead.

A. We have eight passenger cars.

Examiner Herrold: By 8 passenger cars do you mean [fol. 192] eight cars equipped with motors?

The Witness: Yes.

Q. But those passenger cars, as I understand you, are not used as power for moving any freight?

A. No, they are not.

Q. You answered to a question of your counsel that the Youngstown & Suburban was a party to through routes and joint rates. By that did you mean interstate as well as intra-state?

A. Yes.

Q. You also said that the Y. & S. transports coal locally and as part of through routes. From where does the Y. & S. transport coal locally in carloads?

A. Well, I don't know that I can point out any specific instances except that we have on our line at Signal a mine owned by the Hamilton Coal Company. We have been shipping numerous cars of coal from that mine to Youngstown. I would consider that local transportation.

Q. Well, that mine is not on your road, is it, the tipple is but the mine is not, is it?

A. Well, the mine is adjacent to our road.

Q. It is about a mile away, is it not?

A. Oh no, it is only a thousand feet away, a quarter of a mile.

Q. And they move it by truck from the mine to the tipple on your rails?

A. That is right. That is classified as a mine in the A. R. A. classifications.

Q. How many carloads of coal in the last year have you moved from that mine at Signal?

A. Oh, roughly I would say probably 150 to 200 cars.

Q. Now where have you moved coal under through routes and rates?

A. We move coal regularly from the Pittsburgh District through Youngstown, south over the Y. & S. to destinations [fol. 193] on the P. L. & W.

Q. You get that coal at Youngstown and move it south?

A. Yes.

Q. Do you move any in from the P. L. & W.?

A. To Youngstown, yes.

Q. From what mines on the P. L. & W. does that originate?

A. It originates from the mine at Rogers, Rogers Coal Company; the mine of the Wilson Beagle Coal Company at Cannelton, Pennsylvania, the mine of the Francis Coal Company at Darlington, Pennsylvania.

Q. Those mines of the Cannelton Coal Company and the mine at Darlington, both in Pennsylvania, the coal moves under the same tariff, does it, as the coal from Negley would move?

A. Yes.

Q. That tariff is filed with both the Ohio Commission and the Interstate Commerce Commission?

A. That is right.

Examiner Herrold: While you are on that subject, if I have the correct understanding, the coal shipments could not be moved from points in Pennsylvania to destinations in Youngstown at the present time because the switching rates have been restricted so that the coal couldn't move, isn't that a fact?

Mr. Orcutt: I think there has been no change in them.

The Witness: I understood Mr. Orcutt to ask me what we had done in the past year. That movement has taken place in the past year before these rates were changed.

Examiner Herrold: Isn't it a fact now that coal may move from Darlington in Pennsylvania over the Lisbon and Western in connection with the Youngstown & Suburban Railway to Youngstown and be delivered there in switching service which would be absorbed by the Youngstown & [fol. 194] Suburban Railway?

The Witness: No.

Examiner Herrold: Is that because the tariffs have been restricted so that the connecting lines will not accept the coal from the Y. & S. Railway in interstate commerce?

The Witness: Except at local rates.

Examiner Herrold: By that you mean whatever your local rates would be from Youngstown to the next station beyond it?

The Witness: That is right.

Examiner Herrold: But that is not true insofar as intra-state traffic is concerned, especially with regard to coal, at destination points on the Erie Railroad in Youngstown?

The Witness: That is right.

Examiner Herrold: I would like to inquire if the defendants concede in this case if this is actually intra-state traffic and so determined to be that you do actually have now in effect at the present time and did have in effect at the time these shipments were shipped Ohio intra-state rates which would be available to make the deliveries in accordance with the shipping directions?

Mr. Orcutt: I think I can answer that, yes, Your Honor please. The only reason for my qualification is your amendment "under the shipping direction". We of course cannot move interstate traffic under intra-state rates, that is the whole case here. But we have not acted arbitrarily in the matter at all. We are ready, able and willing to move interstate commerce or intra-state commerce in Youngstown under the applicable tariff rates and tariff provisions which exist today. The difficulty here is that the Youngstown & Suburban through its affiliation with the Pittsburgh Coal Company has handed us some interstate shipments and said [fol. 195] "Now you move those at the intra-state rate". Obviously we can't do it.

Examiner Herrold: That is the point to be determined, whether these four cars of coal involved are interstate or intra-state in character.

Mr. Orcutt: Exactly.

Examiner Herrold: Now if it should develop and the Commission should determine that the cars were traffic in intra-state commerce you do have rates available?

Mr. Orcutt: Oh yes.

Examiner Herrold: To make the deliveries as specified in the shipping bills?

Mr. Orcutt: We have rates available in either instance, whether it is interstate or intra-state.

Examiner Herrold: I didn't understand you had it in interstate.

Mr. Orcutt: Oh yes.

Mr. Day: If they pay the interstate charges they can have the traffic moved.

Examiner Herrold: I thought your tariffs were restricted so that you wouldn't accept it in interstate traffic.

Mr. Day: No. There is no refusal to accept the traffic, only the imposition of the condition that the charges be prepaid on the proper tariff basis.

Examiner Herrold: What would be your proper tariff basis if these shipments were moving in interstate commerce?

Commissioner Schaber: Well, in other words this witness here testified that he made a tender of the switching charges as he believed to be the proper amount according to the [fol. 196] tariff on file with this Commission. What do you say if this was found to be an interstate movement whether the amount tendered was correct? There is no controversy on that point, is there?

Mr. Orcutt: I don't know what that amount was but we are making no point of that.

Commissioner Schaber: I see.

Examiner Herrold: The point that I was endeavoring to bring out is this, if the shipments are in interstate commerce, then what are your rates, how would that be handled, do you have any rates?

Mr. Orcutt: Yes.

Mr. Day: That wouldn't be a matter of interest to this Commission, would it, if it was to definitely determine it was interstate commerce? You wouldn't have any concern what it was.

Examiner Herrold: No.

Mr. Orcutt: We will show affirmatively later on that there are interstate rates that would move this traffic. I don't

expect of course my statements to take the dignity of evidence, but we will show that.

Examiner Herrold: I thought there was some dispute about that. That is the reason I raised the question as to the switching charges in Youngstown.

Mr. Gutheim: I submit, Mr. Commissioner, that if everything that is done south of Negley is of interest to this Commission with respect to whether this is intersfate or intrastate commerce, then everything that would be done north of Youngstown would be of interest to this Commission as to whether it was interstate or intra-state commerce and it is of interest to you to know what the interstate rates would be. I think Mr. Fowler can tell you.

[fol. 197] Mr. Orcutt: There is no allegation in the complaint as to any rates whatever.

Mr. Gutheim: Oh well, the Commission has indicated it was interested in the matter and we acquiesced in their views this morning on that subject and I think the carriers might acquiesce in their views this afternoon.

Mr. Orcutt: I just stated, Mr. Gutheim, if you would listen to me, that we are going to show that affirmatively. I don't attempt to stand up here the way you do and make statements in the record under the guise of evidence. We are going to make proof of it.

Mr. Gutheim: You didn't make any proffer of testimony this morning when the Commission asked your witnesses to stand and be sworn.

Mr. Orcutt: No, because we didn't know what you were going to do, and we don't yet.

Commissioner Schaber: All right, Gentlemen; let's proceed. Now Mr. Herrold evidently thinks this matter is of some importance.

Examiner Herrold: Yes, I think—well, I understood Mr. Orcutt to say that they would later on show that the interstate rates would be in the event this traffic is determined to be interstate traffic.

Mr. Orcutt: We have not assumed that would be a matter of interest as to the amount. We were going to show that the tariffs were in effect and are on file today, but if the Commission is interested we will be glad to show the amount.

Examiner Herrold: I think we would like to have all the facts before us.

Mr. Orcutt: We will be glad to give it to you.

[fol. 198] By Mr. Orcutt:

Q. Now Mr. Fowler, your testimony in answer to interrogations of your counsel about your participation in joint routes and rates was, as I understand it, on behalf of the Youngstown & Suburban. Now as to the Pittsburgh, Lisbon & Western isn't it true that that road participates in joint rates and routes from points on its line, mines and stations, into Youngstown via lawfully published rates under which rates any delivery may be accomplished in Youngstown upon the flat rate?

A. Yes.

Q. So that this coal from Negley could have been turned over to connections of the P. L. & W. other than the Y. & S. and be delivered in Youngstown upon the flat rate to any destination?

A. No, it could not.

Q. Why not?

A. We received an explicit routing order from the shipper of this coal, routing it by way of the P. L. & W. and Y. & S. with Erie delivery in Youngstown.

Q. You are correct. I will ask your pardon. I will reframe my question to ask if that could not be done in the absence of specific shipping instructions from the shipper.

A. Yes.

Q. Now how many coal cars has the Youngstown & Suburban?

A. None.

Q. On your exhibit number 2, for instance, which is a copy of the bill of lading covering Big Four car 79,123, I notice that you show the charges prepaid in the amount of $30.00. Does that $30.00 contemplate the movement of that tonnage upon the straight 60 cent rate or did you make any collection of any switching charges from the shipper?

A. That contemplates a movement on the straight 60 cent rate.

Q. You collected no switching charges from the shipper?

A. No.

[fol. 199] Q. Now where did you contemplate this coal was to be weighed?

A. Well, we shipped it under an estimated weight. If necessary to weigh it we could have had it weighed at Youngstown by one of our connecting lines.

Q. Doesn't the Youngstown & Suburban consider it necessary to weigh cars?

A. We do, in most cases the cars are weighed either at the point of origin or point of destination.

Q. But this you have tendered to your connection at Youngstown without having weighed it?

A. Yes.

Q. That is true of all four of the cars, is it?

A. That is right.

Q. Does the Youngstown & Suburban have any scales?

A. Not at the present time, no track scales at the present time.

Q. Who is Mr. J. B. White, do you know?

A. J. B. White?

Q. Yes sir.

A. J. B. White is dead, the J. B. White that I know.

Q. On the back of your exhibit number 1, that is the original, it doesn't appear upon the copies, is a report of seals broken and one car there shows that the seal was broken by or at the plant of J. B. White. I was wondering where that was.

A. Why, that is a plant located between Darlington and Cannelton, it is a clay grinding plant owned by the heirs of J. B. White who formerly ran the plant. I think that it is now operated by the New Castle Lime & Stone Company.

Q. That car, however, I assume was not loaded with coal from Negley?

A. No.

Q. Now in the Youngstown & Suburban Railway Company tariff to which you referred, being Ohio No. 100, I. C. No. 18, will you please read into the record from page 3 Item number 5 under Application of Rates?

A. "Under this tariff settlement of switching charges [fol. 200] must in all cases be made direct between this company and connecting lines, whether such switching charges are wholly absorbed or in part".

Q. Now you referred to Pennsylvania Railroad tariff, Ohio, No. 220, I. C. C. No. 1207. I will ask you to read into the record from page 36 of that tariff the item appearing at the top of the page under "Explanatory statements", and headed "Prepayment of Charges".

A. "Prepayment of charges—Carload freight on which these companies have had a road haul consigned for deliv-

ery on connecting lines as shown herein will not be delivered to connecting line until all charges assessed in accordance with tariffs lawfully on file are paid or satisfactorily arranged for. Notice that car is or will be held for charges, together with statement of such charges, will be sent by the agent of these companies to consignee, also to the agent of the delivering line. Cars with lading will not be received from a connecting line for deliveries shown herein unless all charges, including switch line charges, are prepaid by connecting line."

Q. Now I hand you the Erie Railroad tariff to which you referred, being tariff number 423-C, I. C. C. No. A-6815, Ohio No. 2508, and will ask you to look at page 67 and read the last line under "Application of Rates" at the top of the page.

A. Transportation rates named in this section must be prepaid".

Q. Now will you please look at page 61 of that same tariff to ascertain if it covers deliveries to the Youngstown Ice Company one of the consignees as alleged in your complaint in this case?

A. No, I don't believe it does.

Q. I may have gotten the wrong page. 61, yes.

A. It is a different section of the tariff. This section [fol. 201] reads: "Transportation rates named in this section must be prepaid". That is section 2 of the tariff. Page 61 is section 1 of the tariff.

Q. Does page 61 name the Youngstown Ice Company-

A. The name of the Youngstown Ice Company is on page 61.

Q. Now is the name of the Republic Rubber Company upon page 58?

A. It is.

Q. Now turning back again to page 67 from which you first read, do you not find that item at the top of that page connecting the two sections of the tariff?

A. The top of the paragraph on application of rates states that the transportation rates named in this section between Erie Railroad or Chicago & Erie Railroad industries listed in section 1, pages 8 to 62, or between such industries or team tracks and junctions with connecting lines or from such industries or team tracks to industries on connecting

lines listed in section 1, pages 8 to 62, apply on movements having origin and destination within the switching limits or having origin or destinaton beyond the switching limits where connecting line does not absorb any part of the charges for such movements.

Q. You consider, don't you——

A. I would say without giving it any more study that that made that applicable to the industries in section 1.

Q. You are thoroughly acquainted, are you not, Mr. Fowler, with the operations of the Pittsburgh, Lisbon & Western?

A. Yes, sir.

Q. You have been over that road a good many times, have you not?

A. Yes, sir.

Q. Have you ever stopped at Negley?

A. Numerous times.

Q. Is it a large place, manufacturing center?

[fol. 202] A. No, it is a small village.

Q. Are there any industries there outside of the clay and brick companies?

A. No.

Q. And is it or is it not true that the clay and brick companies, where they use any coal, get the coal right there from their own operations by a stripping process?

A. At Negley?

Q. Yes.

A. Yes.

Q. Now about how far south of Negley is Brush Run?

A. Oh, approximately a mile and a half.

Q. Is that where the new washery of the Pittsburgh Coal Company is located?

A. That is right.

Q. What is the nature of the country between Brush Run and Negley, is it thickly populated, is it a farming community, or is it a rough, uncultivated land?

A. It is cleared land, it is farming property, I would say.

Q. Are there any coal mines between there and Negley?

A. No.

Q. Are there any coal mines operating at Negley?

A. Well that depends on what you mean by Negley. There are coal mines operating within a mile or two of Negley, several of them.

Q. Cannelton, you mean?
A. No, I mean right adjacent to Negley.
Q. Rail mines?
A. There is one plant that occasionally loads coal; very seldom, however.

Examiner Herrold: Is it on the rails?
The Witness: Yes.
Examiner Herrold: In Ohio?
The Witness: Yes.

Q. And is there any production there?
A. Not at the present time.
[fol. 203] Q. Have you ever known any?
A. Oh yes, we have had production of coal at Negley since I have been on the railroad.
Q. But there has been none during the past year?
A. Not during the past year.
Q. Am I to understand from statements of counsel this morning that you have no idea whatever where this coal came from into the washery of the Pittsburgh Coal Company at Brush Run?
A. I haven't any personal knowledge of where the coal came from.
Q. You don't know a thing about it?
A. I don't know where it came from.
Q. There is no mine there at Brush Run, is there?
A. No coal mine.
Q. And there has been no coal produced at Negley during the past year, has there?
A. No. Oh, there has been coal produced at Negley but none mined at Negley at rail mines.
Q. Have you moved any carloads of coal into the washery of the Pittsburgh Coal Company at Brush Run?
A. Not within the last year.
Q. Have you visited that washery?
A. Not recently.
Q. Well have you ever?
A. Yes.
Q. Since it was completed?
A. Yes.
Q. You have gone through it?
A. Yes.

Q. About how much coal will it hold in the process of operation if it were being operated continually, that is, if you were——

A. I am not qualified to answer that.

Q. You don't know?

A. No.

Q. Now as I understand you you say you received notice from the Pennsylvania Railroad and the Erie Railroad Company that on all coal not mined in Ohio delivered by [fol. 204] the Youngstown & Suburban to its connections at Youngstown for delivery to industries not on its line at Youngstown that the full amount of the charges must be prepaid; you said you got such a notice, did you not?

A. I said I got the notice that I read into the record a short time ago.

Q. That is the notice I am referring to.

Mr. Gutheim: Are you referring to the notice that it must be prepaid at the rates which are on file with the Interstate Commerce Commission?

Mr. Orcutt: That is the one.

Q. Now when you got that notice, as I understand it, you caused a tender to be made to the Pennsylvania Railroad of the charges based upon the intra-state basis, did you?

A. We did.

Q. Why, when you received this notice that shipments of coal not mined in Pennsylvania would have to be prepaid, why did you immediately hurry over there and tender to them the charges on the basis of coal mined in Ohio?

A. Because we considered those charges to be the charges applicable to this particular shipment.

Q. Well, did you consider this coal to have been mined in Ohio?

A. We considered this coal to originate in Ohio.

Q. But in accordance with that notice did you consider this coal to have been mined in Ohio or Pennsylvania?

A. As far as we are concerned it might have been mined in Ohio; we had no knowledge where it was mined.

Q. Which did you consider it?

A. I would consider any coal offered to us for shipment at Negley as originating at Negley. Now whether it was mined in Ohio or Pennsylvania or West Virginia is beside the question. As far as we are concerned it originates in

[fol. 205] Ohio. You used the language "mined in Ohio." We didn't.

Q. We used the language "mined in Ohio" and immediately upon receipt of that notice you hustled over and tendered the charges on the basis of coal mined in Ohio, didn't you.

A. Yes.

Q. Now why did you do that?

A. Because we considered that coal to be intra-state transportation for which lawful rates are established.

Q. Did you have any information which would in any way lead you to believe that the coal on these four cars was not mined in Pennsylvania?

A. No.

Q. Did you have any reason to believe that the coal on these cars was mined in Ohio?

A. Yes, because it originated in Ohio as far as we were concerned.

Q. Did you have any reason to believe that it was produced from a mine in Ohio?

A. No more than we had any reason not to believe it.

Q. I don't think that quite answers my question. I think you can answer it yes or no whether or not you had any reason to believe it was mined in Ohio.

A. I answered it yes.

Mr. Gutheim: Well, if Your Honor please, I have sat here patiently and listened to this cross examination but I submit that when these gentlemen attempt to characterize commerce as interstate because the coal was not mined in Ohio they are going beyond the law and the witness has very reasonably answered.

Commissioner Schaber: I think there is some doubt on that point, Mr. Gutheim. I don't know whether they can just say that all intra-state movements must be of material that is manufactured or mined in Ohio.

Mr. Orcutt: Well, if the Commissioner please, Mr. [fol. 206] Gutheim is attempting to throw this off on a legal question here now. All I have asked this witness is whether or not *had* had any reason to believe that this coal was mined in Ohio. That question is brought about by his direct testimony evidencing the fact that the minute he got this notice specifying that coal mined in Pennsylvania must be prepaid he immediately hustled over and

tendered the charges on the basis of coal mined in Ohio under that notice, regardless of any question of law. Now he knows whether or not he had any reason to believe this was mined in Ohio or not.

Mr. Gutheim: What the witness, Mr. Commissioner, has carefully and frankly stated what is the fact, that he paid these charges on the basis of the lawful test and that is whether it is interstate or intra-state commerce, and the lawful test is not whether it was mined here or there or elsewhere.

Mr. Fitzpatrick: One of the elements, Mr. Gutheim, and you know it.

Mr. Day: Why don't you admit the facts, Mr. Gutheim?

Mr. Gutheim: Because we have already agreed that Mr. Morrow would be here to state the facts and I told you I didn't know and I don't know.

Mr. Orcutt: I insist, if the Commission please, that I am entitled to an answer to the question as to whether or not he had any reason to believe that this coal was mined in Ohio.

Examiner Herrold: Let's be frank about this case, Mr. Fowler knows that coal wasn't mined at Negley.

Mr. Day: Of course he does, and he testified at the last hearing in I. & S. Docket 142 and Docket 8833 before this Commission that the coal he would handle through Negley would be coal that came up from Pennsylvania, coal [fol. 207] mined by the Pittsburgh Coal Company. I can't understand this lack of frankness here. It is the policy of the railroads in all these cases to give the Commission the facts and then let the Commission decide it accordingly. I am very much taken by surprise to find such an attitude on the part of the other side here.

Examiner Herrold: I don't think the real situation here should be evaded. Let us have all the facts.

Mr. Gutheim: It won't be evaded. We will have Mr. Morrow here as they requested and you will get all the facts, Mr. Commissioner, but this is our opponent's cross examination.

Mr. Fitzpatrick: This is a man insisting that an intra-state rate should be applied and we are asking him why. It is up to him to show why he believes that intra-state rate should apply.

Mr. Gutheim: He told you, because it is intra-state commerce.

Mr. Fitzpatrick: He won't show the elements that enter into that conclusion, and the question of where it is mined is very important.

Examiner Herrold: Well, let's drop that subject if Mr. Morrow is going to put the evidence in that will clear it up.

Mr. Orcutt: Well, but this is the man, if the Commission please, that is directing the operation at Youngstown, attempting to require us to do something we can't lawfully do. Now I think I am entitled to the answer as to whether or not he had any reason to believe as to whether this was mined in Ohio.

Commissioner Schaber: I just wonder whether the witness hasn't answered that question in his answer here a minute ago.

Mr. Day: His answer is "You can't make me tell you where it came from." That is what it amounts to.

Mr. Orcutt: He says he has no reason to believe that it wasn't mined in Ohio. That is the converse of it.

[fol. 208] Commissioner Schaber: Well if the witness doen't know he can say so.

Mr. Orcutt: That will satisfy me, if he doesn't know whether he had any reason to believe it or not.

Commissioner Schaber: Well, put the question once again and we will see where we are getting.

By Mr. Orcutt:

Q. Mr. Fowler, did you have any reason for causing you to believe that the coal in question loaded in these four cars was mined or produced from a mine in Ohio?

A. No, but I had no reason to believe that it was not mined in Ohio either.

Q. Had you ever prior to this time, prior to the time the Pennsylvania Railroad gave you notice that it would require prepayment of charges on cars of coal mined in Pennsylvania, taken it upon yourself to go over and tender to them the charges on the intra-state basis?

A. No, because it is not customay to do that.

Q. Do I understand it to be your position that these four cars of coal are now in the possession of the Pennsylvania Railroad Company?

A. You do.

Q. When you got notice of the fact that these cars were turned back to you the first time by the Pennsylvania Railroad Company what did you then do, I mean as to advising the shipper of the situation?

A. Why I don't recall explicitly just what we did except that when we received notice from the Pennsylvania, verbal notice I might say, we have never had any other than a verbal notice, we advised the local office of the Pittsburgh Coal Company of the situation. That is the only steps we took.

Q. How did you advise them, by telephone?

A. Probably by telephone.

Q. Is that the customary way you advise the consignor [fol. 209] in the case of refused or unclaimed freight?

A. Well yes, it is the customary way.

Q. Did you ask for disposition orders?

A. No.

Q. Or instructions?

A. No.

Q. You just told them what had happened?

A. Yes.

Examiner Herrold: Right while you are on that subject, Exhibit Number 7 indicates that the Pennsylvania Railroad agent signed up for these four cars of coal on September 19th.

The Witness: Well, in order to clear that up, Mr. Herrold, I had better explain that these interchange statements are made ordinarily by the agent of the company which turns the cars over and he signs the other agent's name to that interchange statement. In this case cars going from the Y. & S. to the P. R. R., our agent would sign the name of the Pennsylvania Railroad agent. If the cars came from the P. R. R. to the Y. & S. the reverse would be true.

Examiner Herrold: Aren't they checked against each other?

The Witness: They are checked at the end of the month when the statement is made or when the summary is made and any inaccuracies or corrections are then made.

Q. Have you at any time tendered to the Pennsylvania Railroad Company the full amount of the charges for further movement of this coal under the basis provided in tariffs on file with the Interstate Commerce Commission?

A. Yes.

Q. I don't want to mislead you. I mean have you ever tendered the interstate basis of charges?

A. I answered that question because the tariff which provides the intra-state charge is on file with the Interstate Commerce Commission.

Q. I thought that was the reason you answered it, but of course that wasn't the intent of the question. Have you [fol. 210] ever tendered to the Pennsylvania Railroad Company the full amount of the charges on the interstate basis covering these four cars of coal?

A. No.

Q. And according to the advice given you by the Pennsylvania Railroad Company that is the reason the cars have not been moved beyond the interchange, is it not?

A. That is evidently the reason, in considering the notice we received.

Q. Now on your exhibit number 8, which is the copy of the transfer sheet or interline switching waybill, below the center under "Switching Charges" at the right hand side under "Amount" appears two columns, one headed "Collect" and the other "Prepaid". Were either of those columns filled out upon any of these interline switching waybills which were put into what you call the box for pick-up by the Pennsylvania Railroad?

A. No, because it is not customary to fill those columns out when the waybill is made.

Mr. Orcutt: That is all I have.

Cross-examination.

By Mr. Day:

Mr. Day: Mr. Gutheim, may I ask if you are going to have a map or plat showing the track lay-out around Negley and Brush Run?

Mr. Gutheim: No, we had not intended.

Q. Well, Mr. Fowler, I will ask you to state then where the line of the Pittsburgh, Lisbon & Western connects with the private railroad of the Pittsburgh Coal Company?

A. The line of the Pittsburgh, Lisbon & Western spur track connects with the plant facility tracks of the Pittsburgh Coal Company approximately one half mile south of the Pittsburgh Lisbon & Western main line at Negley.

[fol. 211] Q. How long has it been since that half mile of track approximately was built?

A. That track was built in 1929.

Q. Was it built to reach this private railroad of the Pittsburgh Coal Company?

A. No, it was built to reach the clay grinding plant of the West Darlington Clay Company.

Q. Where is the interchange or point of connection between the private railroad of the Pittsburgh Coal Company and the Pittsburgh, Lisbon & Western Railroad, with relation to this lead-in to the Darlington brick plant?

A. There is no brick plant there.

Q. Clay plant.

A. Connection with the Pittsburgh Coal Company tracks is approximately 700 feet south of the West Darlington Clay Company connection.

Q. The West Darlington Clay Company spur leads into the east, does it, off that track?

A. West Darlington Clay Company's sidings lead to the east off of that track, to the southeast.

Q. To the southeast. And from the point of interchange or connection between the Pittsburgh Coal Company's private railroad and the Pittsburgh, Lisbon & Western, how far is it to the point where the first spur or lead-in track to the Brush Run plant begins?

A. I could only guess at that.

Q. About 1500 feet?

A. From my knowledge of the territory it is between two and three thousand feet south.

Q. And then some distance farther south there is another track leading into the Brush Run plant, is there not?

A. Yes.

Q. That is it leads in from the south whereas the track you have just been describing leads in from the north?

A. That is right.

[fol. 212] Q. Can you state how far those two entrances on these spur tracks are at the——

A. Well I would imagine, I would estimate that they are a thousand feet apart.

Q. That is at the points where they lead into the plant?

A. Yes.

Q. And then the private railroad of the Pittsburgh Coal Company extends on south to Smiths Ferry, Pennsylvania, does it?

A. Yes.

Q. Is the point of interchange between the Pittsburgh Coal Company's private railroad and the Pittsburgh Lisbon & Western Railroad in the city of Negley or is it outside the city limits?

A. Negley has no city limits. It is an unincorporated village.

Q. Does the Pittsburgh Coal Company have any cars or equipment on its private railroad?

A. Yes they have, Pittsburgh Coal Company has some equipment which they use on their tracks.

Q. What does it consist of?

A. Consists of hopper cars. I don't know how many.

Q. As many as five or six?

A. Oh yes I should say they have at least that many.

Q. Do they also have an engine of their own?

A. Yes.

Q. And those cars and that engine are marked "Pittsburgh Coal Company"?

A. Yes.

Q. When was the private railroad built?

Mr. Gutheim: Well now, Mr. Commissioner, I don't know how much Mr. Fowler knows about the detail of this. As Mr. Morrow was going to offer himself on this subject I suggest that this, which is not really cross examination on the direct, should be deferred.

Mr. Day: All of this track layout and the property at Brush Run has been touched on by the witness. I think the [fol. 213] Commissioner is entitled to know all the facts.

Commissioner Schaber: Yes. Whether this witness knows as much about it as the other gentleman that they wish to call, if you are going into it with both of them, you might eliminate it as far as one of them is concerned. You are just asking now as to how long ago that private road was built.

Q. Will you state how long that private railroad has been built?

A. Well it has been, to the best of my knowledge, these tracks have been finished about eight years.

Q. From Smiths Ferry to the point of connection with the Pittsburgh Lisbon & Western?

A. That is right.

Q. And has the Brush Run plant and the tracks leading into it been in existence about the same time?

A. Yes.

Q. In order to load the four cars in question as the Brush Run cleaning plant I presume it was necessary to handle them over the private railroad into the plant, was it?

A. Yes, in order to load these four cars we, that is, the Pittsburgh Lisbon & Western, turned the empty cars over to the Pittsburgh Coal Company at the point where their tracks connect with ours. Pittsburgh Coal Company engine, I assume this, I don't know it to be a fact, picked the cars up and set them into the Brush Run cleaning plant, that would be the ordinary course of procedure, over their own tracks. When the cars were loaded they brought them back up to the point of connection with the Pittsburgh Lisbon & Western and issued us a shipping order covering the further transportation of the cars.

Commissioner Schaber: How did that loading take place, just transfer from one car into another?

The Witness: I can't answer that of my own knowledge, [fol. 214] Mr. Commissioner.

Commissioner Schaber: Do they have a coal yard there and dump the coal into the yard, was this coal loaded from coal in the yard? What do you know about those facts?

The Witness: The plant is built in the form of an ordinary mine tipple with empty space above the tipple and space for loaded cars below the tipple. At the rear of the plant they have a pit for unloading coal which goes through the plant. Now of my own knowledge I don't know how this coal was handled.

Mr. Gutheim: Mr. Morrow will explain all that, Mr. Commissioner.

Q. Have you already testified when the extension of the Y. & S. between Columbiana and Signal was built?

A. No.

Q. Will you state that fact?

A. The connection between Columbiana and Signal was built in 1929 and '30.

Q. And that was shortly after the Pittsburgh Coal Company acquired the stock of the Youngstown & Suburban?

A. Yes, within a year or two afterward.

Q. And at or about the same time was the charter of the Youngstown & Suburban amended so as to permit it to use steam power?

A. No, I think that happened a year or two later.

Q. The Pittsburgh Coal Company has no mines in the state of Ohio, has it?

A. I don't know.

Q. You have been connected with the Pittsburgh Coal Company's railroad properties for a good many years?

A. Well, I have been with the three railroads which have been mentioned here since 1920, with at least one of the three railroads.

Q. And during all that time you never had any information or heard it suggested that the Pittsburgh Coal Com-
[fol. 215] pany owned coal in Ohio?

A. Oh, I might have had some information or heard it suggested that they owned coal in Ohio, yes.

Q. You did? In Ohio?

A. But I never made it my business to find out.

Q. Where in Ohio?

A. I said I may have heard it suggested. I am not presuming to say that they did or did not own coal in Ohio.

Q. You don't remember that you ever heard such a suggestion ever made?

A. No, I don't remember.

Q. Didn't you testify in I. & S. docket 142 before this Commission on or about May 22nd, 1934, that if you got any coal from Negley it would be coal that was produced by the Pittsburgh Coal Company and handled through their cleaning plant near that point?

A. Well, if you will permit me to see the record in that case I can answer the question. Otherwise I can't.

Q. You don't remember whether you did so testify?

A. No, I do not.

Q. If I asked you now as an original proposition what would your answer be?

A. I would like to hear the question, please.

Q. If coal is tendered to the Youngstown & Suburban for transportation on the Youngstown & Suburban would that coal consist solely of Pittsburgh Coal Company's business?

A. My answer to that question is no.

Q. Well I will ask you if you were not asked at page 131 of the record in the case as I described: "Q. What is the

source of the coal that you propose to move from Negley?" and your answer was "The Pittsburgh Coal Company has constructed a preparation plant, a coal preparation plant at Negley and we expect at some time in the future coal [fol. 216] will be loaded into railroad cars at that preparation plant and shipped over the P. L. & W."?

A. That is right.

Q. That is right. And where would that coal have originated?

A. I don't know.

Q. Can you conceive of it having origin in any other place but the state of Pennsylvania?

Mr. Gutheim: Well now I don't think we had better go into constructions of the witness at all, Mr. Commissioner.

Mr. Day: Maybe you had better not, Mr. Gutheim, but I assume perhaps we would like to. You are not running this case entirely, you know.

Mr. Gutheim: I have a right to object as a lawyer and a gentleman.

Mr. Day: You can object but you can't tell us what we can go into or can't go into.

Mr. Gutheim: And lawyers and gentlemen generally listen when the other side makes an objection. I merely want to say, Mr. Commissioner, that I assume you will decide this on the facts and not on the construction of the witness as to what might be possible. These gentlemen have asked for a witness who knows and the witness will be produced, so I don't think this question is proper.

Mr. Day: Mr. Commissioner, we think this case is going to be decided by the Commission and not by the complainant. I don't think we need any suggestion from him as to how he is going to decide it.

Commissioner Schaber: The witness may answer. Objection is overruled.

A. Yes, I can conceive of it having lots of origins.

[fol. 217] Q. What ones?

A. Oh, Ohio, West Virginia, Pennsylvania.

Q. Where in Ohio? State for the Commission where in Ohio the Pittsburgh Coal Company would originate coal and handle it through its Brush Run cleaning plant.

A. I don't know where in Ohio they might originate it. I don't know the mining properties of the Pittsburgh Coal Company.

Q. You do know that they have a tremendous acreage in Western Pennsylvania, do you not?

A. Yes.

Q. And you don't know of any coal elsewhere owned by the Pittsburgh Coal Company, do you?

A. As I stated, I don't know the ownership of the Pittsburgh Coal Company of coal lands in detail.

Q. Except in Pennsylvania?

A. I don't know it in detail there. I know they have a lot of property in Pennsylvania and a lot of mining plants.

Q. Your answer then is that you do know that they have property in Pennsylvania but you don't know that they have property anywhere else, is that it?

A. That is all right.

Mr. Day: That is all I have.

Mr. Fitzpatrick: I would like to ask a few questions.

Mr. Gutheim: Might I ask if Mr. Fitzpatrick's cross examination will be lengthy? Mr. Morrow has an appointment in Washington tomorrow morning and under the circumstances if it is going to be long I would like to put him on and get him away.

Mr. Fitzpatrick: It won't be long at all, Mr. Commissioner, just five or ten minutes.

Commissioner Schaber: Well, we would be glad to have you respect the convenience of the witness.

Mr. Fitzpatrick: I certainly would be glad to defer.

Mr. Gutheim: All right, if we may have about a five min-
[fol. 218] ute recess then.

(And thereupon a short recess was taken.)

Mr. Fitzpatrick: Mr. Morrow is present for examination.

Commissioner Schaber: Did you desire to finish up with Mr. Fowler first?

Mr. Fitzpatrick: If Your Honor please, it is up to Mr. Gutheim.

Mr. Gutheim: Mr. Morrow is here if you want to hear from him.

Commissioner Schaber: Now who is to examine Mr. Morrow? You are not calling him?

Mr. Fitzpatrick: Mr. Gutheim, I understand.

Mr. Gutheim: Well, I am not calling Mr. Morrow as my

witness for reasons already stated, but I am perfectly willing to question him and go forward with him.

Commissioner Schaber: Yes.

[fol. 219] And also, J. D. A. Morrow, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Gutheim:

Q. Mr. Morrow, will you state your name, residence and occupation?

A. J. D. A. Morrow, President of the Pittsburgh Coal Company, Oliver Building, Pittsburgh, Pennsylvania.

Q. And will you say how long you have been connected with that company and in what capacities?

A. Something over eight years as vice president and president.

Q. And your coal connections go back to a great many years before, does it not, your coal connections?

A. Yes about 20 years.

Q. Now Mr. Morrow, I have informed you as to the circumstances under which you are asked to appear here; and under those circumstances will you inform the Commission what the circumstances are under which the Pittsburgh Coal Company shipped the four cars of coal from Negley to Youngstown as has been disclosed here?

A. The Pittsburgh Coal Company has seven coal mines on the Monongahela River in Pennsylvania. Two of those mines now are in operation. Five are not. The company needs to sell the amount of business that it can from those mines, utilizing the river transportation as far as possible. The logical market for that coal is northeastern Ohio because it is the kind of coal that is not mined in Ohio, it is gas and by-product coal. There is no coal of that character in the state of Ohio. The steel industries, the manufacturing industries of northeastern Ohio are dependent on coal of that character. Now, it is to the advantage of the Pittsburgh Coal Company to increase its sales of that type of [fol. 220] coal in that market, and as a business proposition it is to the advantage of the coal company and the consumers in that territory to utilize the cheap water transportation as far as possible.

The Pittsburgh Coal Company built a private road of its own from the mouth of the Little Beaver River, about ten miles north, to a preparation plant, Brush Run valley, which is a mile and a half or two miles northeast of Negley.

Commissioner Schaber: That is all in Ohio, the road is all in Ohio?

The Witness: No, sir, not all of it. The lower end of it is in Pennsylvania but the upper portion is in Ohio. There is a switch from that preparation plant, switch track that connects with the Pittsburgh Lisbon & Western Railway.

Now I want to distinguish at this point and have the Commissioner have quite clearly in mind the difference between the mining of coal and the preparation of coal for market.

Commissioner Schaber: What is a preparation plant?

The Witness: I was just going on to explain that, Mr. Commissioner. The coal in Western Pennsylvania and in eastern Ohio, in fact all of Ohio, when it is mined and as it comes out in the pit wagons is not suitable for use. In the first place it must be cleaned to some extent, some of it a great deal, and in the next place it must be properly sized before it goes to the customer. So that if you merely stop with the mining of the coal you would not have a merchantable product today. Coal markets are not built on the kind of coal that comes out of the mine at the mine in the pit wagons.

Now this preparation plant that we built at Negley is a modern coal preparation plant. It is designed to handle [fol. 221] 350 tons of coal per hour. The coal comes up the Monongahela River in barges. Let me go back a moment. It is dumped from the pit cars as it comes out of the mine along the bank of the Monongahela River over a tipple that tips the cars over and dumps the coal down into the barges.

Commissioner Schaber: The barges belong to the coal company?

The Witness: The barges belong to the coal company, yes, sir. The barges are brought down the river by the coal company's own tow boats. The coal is landed at the coal company's private dock in the mouth of the Little Beaver River, taken out of those barges there and put into railroad cars.

Examiner Herrold: That point is known as Smiths Ferry?

The Witness: That is Smiths Ferry, yes, sir.

Mr. Orcutt: That is in Pennsylvania?

The Witness: That is in Pennsylvania. On that map up there it is just about where that farmer at the right side—where his left foot appears there. That road crosses the state line just about where the toe of his shoe is and goes up on the other side, that river road, about 10 miles, about where the hand is, the location of this preparation plant.

Now the coal comes up that private road in the Pittsburgh Coal Company's cars just as it comes out of the mine in the Pittsburgh Coal Company's cars back in Pennsylvania. The Pittsburgh Coal Company locomotive takes it up to this preparation plant and there these hopper bottom cars are dumped into a big concrete pit. There is a belt conveyor takes the coal out of that pit up to this coal preparation plant, about 50 feet in the air. There it is dumped into bins, goes down over the screens, is screened and a part of it is washed to get the impurities out of it and it is [fol. 222] made into the sizes of coal that the particular customers desire. One customer may want one size, another want another, and what sizes are made up depends upon the wishes of the users of the coal. These particular cars were sized in accordance with the orders taken for the coal by our sales manager at Youngstown, Ohio, from the customers to whom these cars were to go.

Now I want you gentlemen to get this fact clearly in mind, the coal in those cars never existed in that form until after it went through that plant, didn't exist in that form because it was a mixture of all kinds of coal, several sizes, from the finest dust to lumps larger than that briefcase, as it came out of the mine. Also along with the coal there were a lot of impurities of one sort or another, some slate and rock, dirt of one sort and another, pyrites, mica, calcite, gypsum and various other things included with the coal.

Now the coal that was loaded into these cars was accurately sized after it had been cleaned for the use of these customers, so that in one car there was block coal; coal, in other words, all of the pieces of which were larger than four inches in size. Another was two by four. Now that kind of coal didn't come out of the mine in that form, it had to be prepared in that form for these particular uses. There are a great many of those different sizes and com-

binations of sizes that are required in ordinary business today for users of coal, and the modern selling of coal rests upon the preparation of the coal into the forms, into the size with the percentages of different sizes that the user requires for his particular purpose.

This Brush Run plant is designed and equipped to make 25 different sizes of coal and to mix them in any sort of [fol. 223] proportions that the user may require, because some of them want not merely one size but they want a combination of sizes because such a combination may give them the most efficient use of the plant into which the coal is going. So that from the standpoing of the selling today of coal, the origin of the coal in shipment is not back at the mine mouth, but it is in the tracks underneath the preparation plant, wherever that preparation plant is located. Now for the Pittsburgh Coal Company in the case of this particular coal, that plant is located at Brush Run just south of Negley with a switch from that plant over to the Lisbon Railroad. When the coal is mined in Pennsylvania we don't know what the customer is going to ask for. Mine run coal is dumped into that barge.

Commissioner Schaber: None of that coal is consigned to any particular person?

The Witness: Not at all, no, sir. Days later, possibly weeks later, that coal will go through that plant and be sent to some particular consignee.

In the case of this coal making up these shipments the barge was loaded on the second day of August. It moved down the Monongahela River as barges of coal do to a landing that we have which is a harbor on the Monongahela at Risher, Pennsylvania. That barge lay there until the 25th of August. There was no sale of that coal had been made up to that time. It had been mined in the current operation of the mine. There were other orders placed at that mine for coal and this coal was mined along with the rest of the day's out-turn but that particular barge didn't happen to go anywhere until the 25th day of August.

Then I directed our sales department to start a movement of coal over this road into northeastern Ohio. There had [fol. 224] been some washouts of track during the winter and spring and we had had the track repaired and at that time they advised me that it was ready for operation.

"Well," I said, "All right, start to operate it". And they started the movement of coal up there. This happened to be the first barge that went. The Sales Department instructed our Sales Manager at Youngstown to take orders for coal from this Brush Run plant, find out what kind of coal the users in Ohio wanted and sell it to them, which was done.

Commissioner Schaber: Orders for coal from that point, where are they filled, Pennsylvania or Ohio?

The Witness: Orders for coal? They are filled at this Brush Run plant.

Commissioner Schaber: When you receive that order, does that go to Pennsylvania at any time?

The Witness: Each order is reported to our sales department in Pittsburgh, yes, sir. All of our different branch offices in any part of the United States or Canada report their sales daily to our office in Pittsburgh so that we have touch with all the business of the company.

Examiner Herrold: Was this particular coal handled over your private railroad into Negley or your plant there prior to the time you got the order for the shipment into Youngstown?

The Witness: No, I think not. I think in all probability the coal was on the way before the orders were received for it. That is usually the case with a large part of the coal that is mined. A part of it you have contracts for and another part you sell from day to day and this particular coal was an illustration of the current day by day sales. So I would say, Mr. Examiner, that without knowing exactly about it, the probabilities are that Mr. Egan [fol. 225] at Youngstown obtained orders for that coal between the time the barge left Risher landing and the cars were loaded at the Brush Run plant, a day or two of time would elapse there. Within that period of time he was advised that a barge load of coal was on the way and there would be further movement of coal and he could sell it.

Examiner Herrold: But you still have coal at your plant taken there by barges awaiting orders?

The Witness: No, we haven't shipped any more coal because immediately we found there was difficulty about moving these cars we didn't wish to accumulate coal up there needlessly and let it stand there. We have another barge in the Little Beaver River today that we are ready

to move coal out of whenever this matter is cleared up if we are able to move it.

Examiner Herrold: Did you ship out all the coal you took in there by barge?

The Witness: This first barge, because of low water in the Little Beaver, only contained about 239 tons, which made just about the four cars and part of another car that is still standing there.

Mr. Day: Still standing at the Little Beaver?

The Witness: No, at the Brush Run plant. Now that is the movement of coal.

And I wish to state that from the standpoint of the Pittsburgh Coal Company, from the standpoint of the customer, he is buying coal not from a mine over in Pennsylvania, he is buying coal from a preparation plant in Ohio and the coal that he gets is made for him according to his orders right there at that point and we can't get it at the mine over in Pennsylvania from which this coal came [fol. 226] because there are no preparation facilities at that mine at all, none whatever, purely raw coal that comes out and is dumped into a barge, unsalable in the form in which it is mined so far as that business in northeastern Ohio is concerned.

Commissioner Schaber: Do you have a preparation plant in Pennsylvania?

The Witness: Oh, yes, we have several of them over there, Mr. Commissioner, at other points, but we have no preparation plant of this character on the river for our river mines. This plant is located at this particular place, as I said, because the market for that coal is in northeastern Ohio and we wanted a plant located at a point to which we could ship the coal from any one of our half dozen river mines so that it would act as a central preparation plant; instead of having a half a dozen of these plants at different places Pittsburgh Coal Company has pursued the policy of concentrating them. We have one preparation plant in western Pennsylvania that prepares the coal from four different mines, another that prepares the coal from two and another that prepares the coal from two mines, makes them more economical for operation and at less capital cost of investment to concentrate the preparation of the coal at central points.

Commissioner Schaber: Pittsburgh Coal Company is a foreign corporation?

The Witness: It is a Pennsylvania corporation, Mr. Commissioner.

Commissioner Schaber: Authorized to do business in Ohio?

The Witness: Yes, sir, registered to do business in Ohio.

Examiner Herrold: Well, you would take orders for coal and you were moving your barges in there with the coal at [fol. 227] Negley, any point of destination in Ohio that you might have occasion to ship to?

The Witness: Yes, sir, wherever the tariffs of the Lisbon and the connecting carriers would take coal, might not be in Ohio, might be in Detroit, Kalamazoo, Grand Rapids, anywhere.

Examiner Herrold: Well, say Cleveland or Akron?

The Witness: Yes, sir.

Examiner Herrold: You expect to fill orders for those points if you can get orders for them?

The Witness: That is right. That would be the chief market for this coal.

Examiner Herrold: Youngstown, then, you haven't picked that out as being the only market to ship to?

The Witness: Oh, no, not at all.

Examiner Herrold: And when you ship your coal from your mines in Pennsylvania, you don't know where it is going to go, do you?

The Witness: No, we do not, we do not.

Examiner Herrold: That is one point I wanted to clear up. It goes into Negley and there is prepared and made ready for the trade in such sizes and so forth as the trade requires and you have it then for barter and sale there?

The Witness: That is right.

Examiner Herrold: You don't know where it is going to go?

The Witness: Not at all. It is the customer's coal f. o. b. the tracks of the Lisbon Railroad at that point, he can send it anywhere he wants to that the tariffs will take it.

Examiner Herrold: So there is no predetermined destination?

The Witness: Not at all.

[fol. 228] Examiner Herrold: What I mean is there is no continuity of movement?

The Witness: No, sir. At the time the barge leaves the mine it may not go to Negley at all, it may go to the Wierton Steel Company, for instance, it may go somewhere else, we don't know where it will go even then, but some part of it will go to Negley and we hope an increasingly large part of the output of those mines will go over that way. And after it is started to Negley when we say to our river shipping department "You consign these barges to the Little Beaver and send that coal up to the Brush Run plant," we don't know at that time where the cars and different sizes of coal that are made out of that barge load may ultimately go at all, no knowledge of that.

Examiner Herrold: Couldn't this coal, some of it, be used for steam purposes?

The Witness: Oh, it is used for steam purposes.

Examiner Herrold: I understood you to say it was by-product and gas coal.

The Witness: It is of that character but it happens to be a hard structure coal which fits it to a wide variety of uses.

Examiner Herrold: Could it be used for domestic purposes?

The Witness: It is an excellent domestic coal, it is a high fusion coal, doesn't clinker.

Examiner Herrold: Then you have a general purpose coal wherever it might be used?

The Witness: That is right. It is an exceedingly valuable coal for that reason. It is not confined to steam or by-product coal but has a wide variety of uses.

By Mr. Gutheim:

Q. Mr. Morrow, you mentioned a number of mines on the [fol. 229] Monongahela River, of which two are operated. Who owns those mines?

A. Pittsburgh Coal Company.

Q. Who operates the two that are operating?

A. Pittsburgh Coal Company.

Q. Are those mines operated in such a manner that the coal comes right out of the face in the mine and then is just dumped over the tipple or is there haulage to the river required before it gets to the point of unloading in the barge?

A. At one mine the coal comes out two and one half miles from the river, but the coal is handled four and one half

miles underground from the point at which it is mined before it comes to the open air, so that the actual transportation of that coal is about six to six and one half miles from the point where it is mined down to the bank of the Monongahela River and into barges. The other is a little shorter than that but there is a similar haul to the river bank.

Q. And is that by a mine railroad?

A. That is by the mine railroad.

Q. And who owns that?

A. Pittsburgh Coal Company.

Q. Now who owns the tipple that the coal is then dumped over from the mining cars into the river barge?

A. That is the tipple of the Pittsburgh Coal Company.

Q. Where the coal goes into the tipple is it still the ownership of the Pittsburgh Coal Company?

A. Yes.

Q. And who owns the barges?

A. Pittsburgh Coal Company.

Q. Who owns the tow boats that take the barges down the river?

A. Pittsburgh Coal Company.

Q. And is this place Risher that you mentioned, is that a harbor of the Pittsburgh Coal Company?

[fol. 230] A. Yes, we own the river bank and have the riparian rights at that point.

Q. When you put this coal up to the dock at Smiths Ferry who owns the dock?

A. The Pittsbugrh Coal Company.

Q. And when you lift the coal out of the barges and put it into railroad cars, what is the facility, is that owned by the Pittsburgh Coal Company?

A. Yes, that derrick there is owned by the Pittsburgh Coal Company.

Q. And is the ownership of the coal then still in the Pittsburgh Coal Company?

A. It is.

Q. Is all of the coal that you unload at Smiths Ferry unloaded from barges into cars, or is some of it unloaded onto the dock and marketed there?

A. No, sir, it all goes into the cars. We had a retail coal yard there at Smiths Ferry but in the construction of this railroad and dock that was torn up, destroyed, and it has

not yet been replaced. But we intend to continue that retail coal business at East Liverpool and Midland and adjoining points there, so that in the normal operation there a part of the coal that comes down the river in these barges will be sold at retail right there at Smiths Ferry, some of it will be screened out for retail there and the balance of it will go on up.

Q. Now after this coal is lifted from the barges into the railroad cars at Smiths Ferry what happens to it next?

A. Those railroad cars are transported up to this preparation plant and the coal is dumped into this pit, from which it is carried up into the preparation plant.

Q. Now is that transportation over that private track transported over a track owned by the Pittsburgh Coal Company?

A. It is exactly like the track that comes down from the mine to the river in Pennsylvania, yes, it is our own private track.

[fol. 231] Q. And do you know, Mr. Morrow, if that is the same private track the status of which was brought into issue by this coal company in the injunction proceedings in the Eastern District of Ohio?

A. That is the same track.

Q. When the coal arrives at the Negley plant is it still in the ownership of the Pittsburgh Coal Company?

A. It is.

Q. And is it ever sold by the Pittsburgh Coal Company until after it is sold out of the Negley plant?

A. Not until after it has been through that preparation plant and then prepared properly for market, for sale.

Q. Now as a matter of fact could either of these mines now in operation on the river ship this coal in satisfaction of those orders on which you ship this coal from Negley?

A. No.

Q. And why is that?

A. Well because one of the mines has no preparation facilities whatever, that is the mine from which this particular barge was shipped. The other mine has some preparation facilities at the mine. But suppose you screened out a bargeload of block coal, for example, four-inch block, and loaded it into the barge; when that barge is brought down to Smiths Ferry and the block coal was taken out of there with a clamshell bucket and put over into railroad

cars there would be so much breakage of that coal that the retail dealer to whom that car would go or the gas plant to which it might be shipped, either of them would refuse to accept it because it would contain such a percentage of fine coal he would say "This isn't what I bought and paid you for, I can't use it with that fine coal in there, I won't have it unless it has been rescreened", so we would have to take that barge of block coal, load it into these railroad cars and take it up to this plant and rescreen it, even [fol. 232] though we had made an initial preparation of it at the mine that has some preparation facilities. So that as a practical matter in the movement of that coal by barges, by this means we must have those preparation facilities after the coal has left the barges.

Q. One other thing, Mr. Morrow, you have mentioned and that is the question of waste at Negley. Is all of the coal that goes into Negley shipped out of Negley or is there a wastage that never goes into commercial transactions?

A. There is a wastage in the normal operation of that plant, about four percent of the material that goes in will be dumped right there and left. That will be the extraneous mineral material that is removed from the coal, impurities that are taken out of it. That amounts to a considerable tonnage of coal. At our Champion One preparation plant in the normal operation of that plant when it is running double shift, fourteen hours a day, we waste about 900 tons of material taken out of the coal and discarded.

Mr. Orcutt: In what period?

The Witness: In one day, fourteen hours.

Q. And if all of the business were shipped from the mine upon railroad rates you would be paying the railroad rates on coal on that amount and eventually waste it, would you not?

A. That is right.

Q. Is there in contemplation any further development by the Pittsburgh Coal Company at Negley in the use of its coal which is temporarily in abeyance pending the settlement of these various controversies?

A. Yes there is. A definite part of the plan for that plant there is the carbonization of the smaller sizes of the coal in the form of a new fuel, smokeless without any soot for household use and for industrial use. That plant is

[fol. 233] not constructed, we won't build it until we get some of these issues cleared up. But we have a similar plant in operation in Pennsylvania now.

Q. And it is in commercial operation, is it not?

A. It is in commercial operation.

Q. What you know as a low temperature coal distillation plant?

A. We have five times as much orders for the product as we can supply now. We are enlarging it this minute.

Q. Is that product a product that is susceptible of use only domestically or is it also susceptible of use industrially

A. No, it has a very wide range of uses. One of the uses to which it will be put will be to take the place of Pocahontas coal that is shipped up from southern West Virginia into northeastern Ohio to mix with western Pennsylvania coal in the manufacture of coke to be used in blast furnaces. That West Virginia coal is shipped up there on a $2.64 freight rate. We can make this artificial low volatile coke oven charge, mix it with our coal and save the steel industry of Northeastern Ohio a very considerable sum of money.

Mr. Gutheim: I have no other questions, Mr. Commissioner.

Cross-examination.

By Mr. Orcutt:

Q. I don't think I will have a great deal of cross-examination in view of the very precise statement that Mr. Morrow has made, but I did want to ask a few. You referred to seven coal mines, two of which were in operation. Were you referring exclusively to river mines?

A. Yes.

[fol. 234] Q. Is it true that any coal unloaded from the barges at Smiths Ferry and loaded upon your cars will move from thence to Brush Run?

A. Yes, it will all move to Brush Run except what is sold locally.

Q. If any is sold locally will you load it on your own cars?

A. No, that will be sold to retail dealers who would come in their trucks and get it down there at Smiths Ferry.

Q. So that any that is loaded from the barge on your cars will also go to Brush Run for cleaning?

A. That is right, it will all go to Brush Run.

Q. How many cars have you?

A. I believe we have twenty.

Q. Now does this cleaning plant at Brush Run depend for efficiency and low unit cost upon continuous operation?

A. Well it doesn't have to be continuous operation, by that it doesn't have to be 24-hour a day operation, but it should be operation at the capacity it is designed to clean, to prepare.

Q. In other words, you don't want to feed in any more than you put on through and ship out?

A. No. We would prefer to run that plant seven hours a day. If we didn't have orders enough to run it six days a week or five days a week we would run it three or four but we would run it a full day when we ran it if we could.

Q. Yes, but would you accumulate large piles of coal there to put through?

A. No.

Q. If you unloaded the coal from the cars into a dump pile and then had to later move that into your pit to run through your washer that would be a costly operation?

A. There would be no object in that. Whatever give and take in the operation of that plant will be necessary will be [fol. 235] taken up ultimately in two ways. We will have sufficient cars of our own, Pittsburgh Coal Company cars, to provide some flexibility in the operation of the plant, both for the movement up to the plant and to hold loads of coal that have come through the plant for which we might not have orders that would exactly balance with the day's operation of the plant. For instance, if you had orders to make certain sizes of coal out of—well, for example, if we were putting two thousand tons through that plant, we might have orders for two sizes of coal that would use up 1500 tons out of the 2000. Now we have to make the other 500 tons into the sizes that ran, we might not have orders enough that—to use those sizes. We will have cars enough to hold that. There is always a little give and take at the end of any day's business in a coal plant. When this coke oven is in operation there will be a storage pile of coal at Brush Run, that would be the fine coal.

Q. And when this coal comes out of your plant at Brush Run, it goes directly into cars, it wouldn't go into a coal pile?

A. No.

Q. So if the orders for coal do not take care of the coal as fast as you probably would wish so you will only operate four or five hours a day, is my understanding correct that you won't accumulate the coal at Brush Run?

A. It would be accumulated already in barges on the river, a certain accumulation is always there at our landings, and in the operation of the river department we wouldn't take one single barge down there usually. The coal to Smiths Ferry would be a part of tows that would be going down the Ohio River, it might be going to Steubenville or Wierton or the Ironton Power Plant down there or some other customer down the river. If not, we would take an entire tow of barges down the river to Smiths Ferry, that would be tied up there and from that point individual [fol. 236] barges would be put in and coal moved up to the plant as required.

Q. And from that point the coal would be moved in as you required it to go through the plant and not accumulated at the plant?

A. No, we wouldn't accumulate much at the plant.

Q. Now I assume it is your intention as far as possible to have orders for these specific sizes before you start running the coal through the plant?

A. Oh yes.

Q. So that you will know whether to turn out block coal or to turn out a mixture or two-inch lump or what?

A. That is right.

Q. So that is it a safe assumption that when coal is loaded onto the barges at Smiths Ferry and started from there you know it will go through the cleaning plant and come out a certain size and go to Youngstown or Cleveland or Detroit?

A. No, that wouldn't be a safe assumption. In the sale of coal you have a certain proportion of your company's or your mine's output sold on year-round contracts. No mines in Western Pennsylvania that I know except one are fortunate enough to have all of their mine output sold on contract. They have to run the mines to supply the contract. Then the economical thing to do is to get out the mine's

normal output. If that is 2000 tons a day and you have contracts for 1500 a day you don't mine just the 1500, you mine the 2000 because you get a lower cost, and you say to your sales department "You have got to sell the extra 500 tons" and they sell it one place today, they sell it one place tomorrow, some days they don't get it sold, and, as your operating officials know, it piles up at your mines and sometimes we consign it to the lake front and get the demurrage and everything else. Now we will have the same experience at Brush Run, some of the coal we will know when it leaves [fol. 237] the barge at Smiths Ferry that it is to be made into certain sizes and go some place, and perhaps a considerable portion of it we won't know anything about it except it is part of the shipment and it also has to go up there in order to make the sizes for which we have the orders.

Q. But under your present operation it is not your intention to accumulate it in piles after you clean it at Brush Run?

A. Oh no, not any more than is necessary in the current operation of the plant.

Q. When this comes out of the plant it goes right into the railroad cars and not into the cars of the Pittsburgh Coal Company?

A. That is right.

Q. Does the Pittsburgh Coal Company own any mining properties in Ohio that are in operation?

A. Yes, sir.

Q. Where?

A. We have a mine in southern Ohio that is in operation.

Q. In what field?

A. Pomeroy field.

Q. It is not your intention to bring any coal to be put through the Negley plant from the Pomeroy field?

A. No, I don't believe we will do that. We also have coal business with coal of that type we probably would mine it in eastern Ohio and I think if we wanted to supply Ohio in eastern Ohio.

Q. What carrier serves you there in the Pomeroy field?

A. The Hocking Valley, C. & O.

Q. Is that the only mining operation you have in Ohio operated?

A. It is the only one that is operated today. We are not operating that mine, it is leased to another party, but the mine is ours.

Q. Now this whole plan that you have outlined as part [fol. 238] of a plan to enable you to market coal in northeastern Ohio was quite an expensive plant, was it not? I don't care for figures, it was not a small plant, was it, by any means?

A. Oh no, it is not a small plant.

Q. The cost of it ran well up into the millions, didn't it, considering the whole thing, your railroad, your washery?

A. That is right. That is not unusual in the production and sale of large tonnages of coal.

Q. No, but this is a sizable operation?

A. It is a sizable operation.

Q. Is there any difference essentially, aside from perhaps the sizes that are turned out and perhaps the efficiency of operation because the Brush Run plant is newer, between your washery at Brush Run and your Champion washery on the Montour?

A. No. They employ the same general process, Mr. Orcutt, much the same type of design.

Q. The coal comes through there and goes into the washery and out and right into the cars and is moved on?

A. That is right. And there is a coke plant at Champion One for which fine coal is stored and from the storage piles a part of it goes into the coke plant and that is exactly what we will have here.

Q. Now you have an arrangement in connection with the Champion washery and perhaps some of the others that the coal will move in and be washed and loaded in cars and moved out to destination on the through rate, do you not?

A. We have a cleaning in transit rate there.

Commissioner Schaber: Where is that?

The Witness: That is at our Champion plant in Pennsylvania.

Q. And one of those hauls or both of them are wholly [fol. 239] intra-state, are they not, that is the haul to the washery is always intra-state?

A. Geographically it is all in the state, if that is what you mean. I don't know whether it is intra-state in the legal meaning or not.

Q. It doesn't go outside of Pennsylvania before it goes through the washery?

A. No.

Q. And there is a rate to the washery and a rate from the washery to the destination?

A. No.

Q. The combination of which would exceed the through rate?

A. No. There is a charge for dropping those cars off at that point and taking the coal up again, as I understand it. I am not familiar with the technical interpretation of that tariff. We call it a cleaning-in-transit rate. It is a charge of so much per car for every car that stops at that plant.

Q. And those movements are covered by separate billings, are they not, the movement in and the movement out, and then the billing is matched up under the transit accounting?

A. I can't tell you whether that is done that way or not.

Q. But that is a continuous operation from the mine to the washery and through the washery into the cars and then to destination, is it not?

A. Yes, if the coal moves through the plant.

Q. And it moves under a through rate from the mine to the destination regardless of what has been done at the washery to it?

A. That is what happens to most of it. Some of it goes into coke there and it goes out entirely separately.

Q. Now what is the essential difference between that operation and the operation at Brush Run, considering the movement of the coal from Smiths Ferry into the washery [fol. 240] and out into the cars and then to Youngstown or Cleveland or wherever it goes, except the fact that the movement into the Brush Run plant is via the private railroad of the Pittsburgh Coal Company?

A. Now the difference is this, if you would take our Warden cleaning plant for instance,——

Q. I had in mind the Champion.

A. The Champion has the mines and the cleaning plant all located on the same line of railroad. Now in this case that doesn't happen to be the case. The mines are located on a river, the cleaning plant is located on a different location, entirely separate and apart from it. Now the parallel would be the comparison with our Warden plant in which the coal from our Ocean mine is brought across to the Warden mine and prepared there in the Warden preparation plant.

Q. Brought across how?

A. It is brought across on an aerial tram by a conveyor line on a wire. Now we might have employed that to take this coal from the river up to Brush Run but our engineers told us it would be more economical to use a private road, just as we have a private road bringing the coal from the mine in Pennsylvania down to the bank of the Monogahela River before it gets into barges, cheaper transportation than the aerial line would be.

Mr. Day: By a private road you mean a private railroad?

The Witness: Yes. The road down from the mine is a private railroad too.

Mr. Orcutt: That is all. Thank you.

Examiner Herrold: This coal that moves from the Pennsylvania mine to your cleaning plant at Negley the title of that coal never changes until you ship it out of Negley, does it?

The Witness: That is right. The title is in us until after [fol. 241] it is loaded on the cars.

Examiner Herrold: Until you get an order to ship it out of Negley?

The Witness: That is correct, Mr. Examiner.

Cross-examination.

By Mr. Fitzpatrick:

Q. May I ask a few questions, Mr. Morrow?

A. Certainly.

Q. I am confused by some of your answers to questions of Mr. Herrold.

A. I am sorry I didn't make them clear.

Q. Perhaps they were but not to me. I understood your testimony at the outset to be to the effect that you had orders covering these four cars at Youngstown at the time the coal was on barges at Risher, Pennsylvania?

A. Oh no, I know we didn't have orders at that time.

Q. Well, can you state clearly when the orders were given you?

A. No, I would have to look that up. I recall calling my assistant sales manager on the telephone and saying to him, "Our chief engineer advises me that our road in Ohio is

ready for operation. I want you to start moving coal immediately. That means today." He said "All right, we have some barges at the river and I will start them down", and this is the first one he started. Now I know he had no orders at that time at all.

Q. Don't you have a number of long-term contracts, such as for six months, nine months or a year?

A. In the coal business we call a contract for one year a short-term contract. A long-term contract is for several years. A portion of our coal is on contract for a year or for the season of lake navigation, for example, or something [fol. 242] like that.

Q. Do you have any long-term contracts with the Republic Rubber Company, or have you had them in the past?

A. We have had in the past. We haven't at the present time. Our sales to them are current sales.

Q. What was the most recent date as of when you had a long-term contract with them?

A. I don't know. I think about two years ago.

Q. Since then have you had contracts running over a period of two months with them?

A. No, most of the orders of coal are for the shipment of a specified number of cars of a particular grade or kind of coal or else they are shipments of so many cars during the month, 30-day orders we call them in the main.

Q. Isn't it your plan to satisfy long-term contracts through this Negley plant?

A. If we can make them it is. We hope we can.

Q. What you call the process of preparation, doesn't that consist wholly of washing and screening?

A. No.

Q. And removal of foreign matter?

A. Well yes it does, the washing of the upper sizes of coal, the four-inch block, for instance, the larger pieces of block are picked out of there by hand, that is not washed, but the smaller coal is all washed and that is all sized or screened, in other words, but it may involve also a mixture of those different sizes after it is screened out.

Q. Until now it hasn't involved any mixing process at all?

A. Oh yes, Pittsburgh Coal Company has been mixing sizes of coal for a number of years.

Q. At Negley?

A. Oh no, not at Negley. We have at other plants. The stoker locomotive fuel that we supply the Pennsylvania is a mixture of sizes of fuel for their specifications. It is for [fol. 243] the Erie Railroad too.

Q. This coal from your Risher mine now, where does that coal move now?

A. That is not a mine, that is a harbor, a place where we tie up barges.

Q. Well the two mines at which you don't have cleaning plants, where does that move now?

A. The coal from one of those mines, the most of that is going to the Pennsylvania Railroad for fuel as it comes from the mine. That is one of the few customers we have for coal of that character, and I will say it is the kindness of the Pennsylvania Railroad that they accept the coal in that form. If they were very particular about it I suppose they would say we would have to get other coal that is better because it isn't as well prepared as it should be. Now we want to increase the output of that mine and if we increase the output we must give that coal a proper preparation. We can't do it at the mine. We can do it at this Brush Run plant. The mine now is running on a very limited tonnage of coal.

Q. Taking one car of coal from the siding on the Pittsburgh Coal Company Railroad at Brush Run, how long would it take to run it through the plant to a car of the P. L. & W. at the proper loading place?

A. You mean from the time the coal is dumped into the hopper?

Q. Yes. In other words what is the run of time from the car of your company through the plant to the car of the P. L. & W.?

A. It might not be a car of the P. L. & W. It might be the car of any common carrier that was put in there.

Q. A car that was on the P. L. & W.?

A. Why, it would take from four to five minutes for the coal to go through the system.

Q. In other words the plant can be so operated that cars [fol. 244] come in and within an hour pass through the plant and go out?

A. Oh yes, yes, 350 tons an hour, 50 tons of coal would go through the plant in about nine minutes, but an indi-

vidual lump of coal would go through in about four and one half minutes.

Q. Now you stated to Mr. Orcutt that you had spent plenty of money as a part of a plan to dispose of coal—

A. I don't want to give the impression that we spent money extravagantly. As a matter of fact we have made a very economical purchase of property and construction, remarkably so.

Q. Well among other things as a part of your plan to put Pennsylvania coal in Youngstown you acquired the Youngstown & Suburban Railway Company, isn't that true?

A. Well now the Youngstown & Suburban Railway acquisition is a long way back and it is early in my connection with the Pittsburgh Coal Company and when you talk about the plans of the Pittsburgh Coal Company, I don't want to attempt to speak for all the things the board of directors of that thing may have had in mind in previous years. I know perfectly well what I wanted to do.

Q. And that is the way you understand it?

A. Well they had the idea that they would need to use transportation from the Ohio River up there.

Q. As a means of putting Pennsylvania coal into Youngstown?

A. Yes, sir.

Q. Would you mind stating if, since your connection with the Pittsburgh Coal Company, Mr. W. E. Thaler was a director?

A. He has never had any connection with the Pittsburgh Coal Company.

Mr. Fitzpatrick: That is all I have.

By Mr. Orcutt:

Q. I had one question I forgot to ask. All this coal that [fol. 245] went through the washery or that will go through the washery at Brush Run, including these specific four cars under consideration, none of it was intended for use at Brush Run, was it?

A. No. There might be some small sales of coal locally there but probably not. We don't consider it as a commercial proposition.

Q. Who would it be to?

A. It might be to some local consumer, some farmer might come around and get some.

Q. Get a wheelbarrow-load?

A. Yes, but we are not selling it at retail.

Q. You didn't make this development to sell coal at Brush Run?

A. No, there is no local merchant at Brush Run.

Q. And isn't the loading facility of the plant so adjusted that the coal will only fall into cars on the siding?

Mr. Gutheim: What was that question?

(Question read.)

A. It is at the present time. It would be very easy to run one of those cars out to a little location there for a truck loading if we wished to do it. We wouldn't load it under the tipple, we wouldn't do that at any of our mines.

Q. It would have to be loaded into a railroad car first?

A. We would load it into our own car. There is a place back on the road where we could load it on our own plant.

Mr. Gutheim: My inquiry went to the use of the word "fall" because Mr. Morrow testified in the other case that it is very carefully laid down in the car.

The Witness: No, it doesn't fall at Brush Run, it is laid very gently down into railroad cars so there won't be any breakage of it.

[fol. 246] Cross-examination.

By Mr. Day:

Q. Mr. Morrow, when Mr. Fowler was on the stand I asked him some questions regarding the track layout in the vicinity of Brush Run and Negley. Did you hear Mr. Fowler's answers to those questions?

A. No, I didn't get clearly just what his answers were.

Q. You touched rather briefly on the subject of some of the tracks in that vicinity and your testimony seemed to vary somewhat from the testimony of Mr. Fowler and I wanted to know of you could agree that Mr. Fowler had correctly described the facts in his testimony.

A. Now, I am not at all sure that Mr. Fowler knows what the track layouts are of Pittsburgh Coal Company's mine

properties or any of their properties. He has no connection with our company at all. He might have been down there as an observer seeing how those tracks are but he has no other information about it.

Q. Well the point of connection between the private railroad of the Pittsburgh Coal Company and the Pittsburgh Lisbon & Western is how far from the Pittsburgh Lisbon & Western's main line?

A. Well, I don't know exactly, because, just as Mr. Fowler is not familiar with all the details of the Pittsburgh Coal Company property, I am not familiar with those of the Lisbon. It is perhaps a mile south of the main line but I am not certain that is the correct distance, Mr. Day.

Q. Will you state how far it is from that point of interchange between the Pittsburgh Coal Company's private railroad and the Pittsburgh Lisbon & Western Railroad to the point at which the spur to the Brush Run plant leads into the plant?

[fol. 247] A. If you are a good golf player it is about as far as you can drive a golf ball.

Q. About 300 yards?

A. I don't believe it is quite that far, Mr. Day. It may be.

Q. How far would you say it was?

A. It is about 200 yards, I would say. It may not be just that amount, but, as I recall it, it is about that distance.

Q. And then there is another track leading into the Brush Run plant coming up from the south?

A. That is right.

Q. How far would you say that was from the north entrance to the south?

A. Perhaps a quarter of a mile, maybe half a mile.

Q. And how far would you say either one of those spur tracks would be from the Pittsburgh Coal Company's private railroad to the plant, to the Brush Run plant?

A. About a quarter of a mile.

Q. The length of each track would be about the same?

A. Yes, just about I think.

Q. And then how far is it from the point of interchange between your private railroad and the Pittsburgh, Lisbon & Western and Smiths Ferry?

A. Well it is somewhere between 11—about 11 miles as I recall it.

Q. The coal that is in dispute here, the four cars that were shipped to Youngstown, was described in the bills of lading and other papers as being furnace coal.

Mr. Gutheim: That is only one car.

The Witness: That is one car was furnace coal.

Q. And what were the others?

A. One car is block and one car is nut, stoker and slack, I think, a mixture of sizes there, as I recall it.

[fol. 248] Mr. Gutheim: Two cars of the last.

Q. That coal is used for steam or domestic purposes as well as being used for metallic or by-product purposes?

A. That is right.

Q. Is that true of all of the coal shipped from these particular mines?

A. Yes, it is true of these mines on the river. It is not true of some of our other mines that are on the rail.

Q. Does the particular use for which the coal is sold determine the price that you get?

A. Well to a certain extent it does, yes.

Q. In other words if you sell it for metallic coal you can get a price different from what you would if it went for a domestic use?

A. You probably would, you would prepare it differently. It would depend on what the specifications of the user were. If he wanted a very exact preparation with the utmost elimination of sulphur and other impurities in the coal we would charge him a higher price than if he had a less rigorous specification for his coal.

Q. By the construction of the facility at Brush Run and the new coke plant you hope to build there at some time in the future you expect to increase considerably the volume of coal you will ship into Ohio, do you not?

A. Yes, sir.

Q. Can you estimate approximately the amount of the increase in your business that would result?

A. Oh, I don't know that we can estimate it exactly. It wouldn't, as I said before, it wouldn't necessarily be confined to Ohio. This coal may move over into Michigan too, part of it will, a very large market over there for coal of this particular character in the Detroit and Michigan area and [fol. 249] no reason at all why it shouldn't move over there

as well, as well as in Ohio. And I might add, Mr. Day, that business over there would be entirely new business for our company. We are not shipping any coal over there at all.

Q. And to all of these areas what would you hope to do in the way of increased business?

A. Oh, we might sell a million or two million tons of coal in that market.

Q. Extra?

A. Yes, beyond what we would otherwise sell. By the substitution of low temperature coal for Pocahontas coal it would provide a market for five or six hundred thousand tons of coal alone in northeastern Ohio, which also would be entirely new.

Q. Well, the coal that you will ship there, as I understand it, will be used for steam and domestic purposes as well as any other purpose?

A. Every purpose that anybody can use coal for that we can sell it to him for.

Mr. Day: Thank you. That is all.

Redirect examination.

By Mr. Gutheim:

Q. This increase, Mr. Morrow, that you say will be new business for your company, will it also be new business for the railroads that serve you?

A. Yes, it will be new business for these railroads here. That coal now going into those markets and for those uses comes up from southern West Virginia.

Q. You spoke of the fact that there would always be a difference, that may not be the word you used, between the coal that would be actually manufactured at Negley and the coal that would be shipped out; in other words, that there would be some that you would hold on track in cars. Now [fol. 250] do you mean that that would be coal that you would hold subject to demurrage rules and penalties, if any, that is, unbilled coal?

A. Well it would be subject to the same rules that apply to our mines, our mine tracks as I understand it. We won't hold it there intentionally. It will be faulty salesmanship if we have to hold any of it at all, but no sales organization in the coal industry is perfect, but I know there will be some times, a good many days that we will have three or four cars

held over until we get a sale for the coal, some days they will stand two days before we get them moved. We are under no delusions about that.

Q. You differentiated between the operation of the Champion cleaning plant and your Warden plant, but to differentiate further can you say whether it is the fact that all of our coal that comes into the Champion plant comes by a common carrier railroad?

A. Into Champion, yes, I think it does at the present time.

Q. And the coal that comes from Ocean over to Warden comes by an aerial tram?

A. Yes, that is our own aerial tram, privately owned.

Q. And the coal that will come into Negley will come by private barge and private track?

A. That is right.

Q. Now with respect to when this title will pass, is it the fact that in addition to title not passing from the Pittsburgh Coal Company from the time the coal is in the ground in the mine until it leaves the Negley plant, that there have also been two changes in packages from mine cars to barges and from barges to railroad cars?

A. That is right, before it gets into the car in which it is going to be shipped to the customer.

Q. Yes.

A. That is correct.

Q. In selecting Negley as the location of this plant was it [fol. 251] selected merely because it was on the Pittsburgh, Lisbon & Western or was it selected with respect to its location to market otherwise?

A. The reason for the selection of that location was physical reasons. The location of a preparation plant of this character with the disposal of considerable quantities of waste material, you must be sure you have plenty of cheap ground on which to dispose of the waste and also that you are not in a populous section where there will be complaints of nuisance or dust or water from that plant. This Little Beaver Valley at Brush Run widens out and is a fine location there at Brush Run, there are one or two other locations in that vicinity for a plant. Below that point the river valley is very narrow with high sides, steep, and a good deal of fall to it, there is no suitable location anywhere in there for a plant of this description. There is none at the

lower end on the Ohio River bank either. So that it is not our desire to go that far up there to have a preparation plant but it is a very acceptable location for such a plant because of the nature of the ground, the opportunity to store water, to purify it so that there will be no pollution of the stream below it and there is abundant opportunity for the storage of coal there and the storage of coke in the operation of the coke plant, tar refineries and other things there in that vicinity.

Q. Now is it also a fact that once you load the coal into common carrier cars for shipment at Negley you have an original package that goes through to the consignee?

A. Yes.

Q. And what effect has that, if any, on the question of degradation of the coal that you already mentioned with respect to the movement up to Negley?

A. That gives the customer the least degradation in product that is possible. He has the coal prepared, carefully [fol. 252] sized and screened and loaded on retarding conveyors into these cars, so that if a customer orders a car of block coal or a car of two by four egg or whatever it may be, he gets just exactly that size without an attendant breakage of coal that is objectionable to him.

Recross-examination.

By Mr. Fitzpatrick:

Q. May I ask just one more question, please? In all this increased business you expect to acquire you hope, I take it, to supplant some coal now mined in Ohio, do you not?

A. No, I don't think we will supplant any coal now mined in Ohio because the character of this coal goes to users that are not using Ohio now in any considerable quantity. There may be some supplanting of Ohio coal but there will be just as much supplanting of Pennsylvania coal by Ohio coal because that is a current fluctuation of business that goes on from day to day and month to month always. Nobody ever keeps all the customers from one year to another.

Q. Certainly that supplanting would be true insofar as your coal is made available for domestic purposes?

A. Well, coal of this description is going over there for domestic purposes now. But the low temperature coal that goes into Ohio ultimately from this plant for domestic use

will not be supplanting the Ohio coal, it will be supplanting the high-priced domestic coal from the south.

Q. How about steam coal, wouldn't it be sold for that purpose?

A. A small part of it may be sold for steam coal but this is a better kind of coal than ordinary steam coal and we can usually get a better price for it somewhere else. There will [fol. 253] be some necessarily sold for steam use too, if we have a car of coal and cannot dispose of it elsewhere we will sell it for steam use, but we are not going into the steam market.

Q. I thought you stated your coal would be available to all uses.

A. It is.

Q. And to that extent will be used for steam?

A. That is right, if we have a car of nut, pea and slack left over some evening and we can't sell it to a by-product plant or some industrial user of a gas coal we can sell it to a steam user and he would be glad to have it, but we would rather sell him some of our steam coal out of western Pennsylvania if we can because we need the market for that coal too.

Q. The use of this Negley plant on coal from Pennsylvania, that will substitute the Negley route for what routes that you have been using in the past?

A. Well, the extent that it will supplant the present day movement of western Pennsylvania coal, I assume it would affect the Pennsylvania, the P. & L. E., the Baltimore & Ohio Railroads.

Q. The point is you are now moving the same coal into Youngstown today over the lines——

A. Oh no, we are not. That is just where you and I differ. This is additional business we expect to get. There isn't any object of the Pittsburgh Coal Company spending several millions of dollars just to compete against itself and shut some mines down that are already selling coal in eastern Ohio.

Q. You mean to say you have a coal business in Youngstown today?

A. Yes, good coal business which we expect to keep in the mines that are in operation now. We don't want to shut those mines down. This is additional business that we are [fol. 254] after and expect to get.

Mr. Fitzpatrick: That is all.

By Mr. Day:

Q. The fact of these four cars, Mr. Morrow, is that two of them were for steam purposes?

A. I don't know what the Republic Rubber is going to use that for. I assume that they probably are for steam use.

Q. They wouldn't be likely to use that for by-product coal?

A. No, I don't think so. You see I shot this barge of coal to our sales department and said, "Get orders for it." Most coal is already under contract.

Q. And it would seem that the two cars of coal shipped to Youngstown Ice Company are for domestic use?

A. Yes, probably that is true.

Q. There is coal shipped into Youngstown from Ohio mines for steam as well as domestic use?

A. Yes.

Mr. Day: That is all.

Commissioner Schaber: Anything further?

Mr. Gutheim: Nothing further. Mr. Commissioner, I may overlook it later and therefore I would like to say that one of the cases on which we will rely——

Commissioner Schaber: Just a moment. Did you care to further examine Mr. Fowler now?

Mr. Fitzpatrick: I did have a few questions I might ask.

Mr. Gutheim: I expected that but I thought this would be a good point to get this in. It is just to this effect, that one of the cases on which we shall expect to rely is the decision of Judge West in the case of the Pennsylvania Railroad Company and the Pittsburgh & Lake Erie Railroad Company against the Pittsburgh Coal Company and others, which was decided in the District Court of the [fol. 255] United States for the Northern District of Ohio, Eastern Division, about six or eight months ago. I don't know whether that decision is as yet reported and if it has not been I would like to have the privilege of furnishing copies to the parties on the other side so as to make sure we have it in the record here.

Commissioner Schaber: All right.

Mr. Gutheim: Now, Mr. Fowler, if you will resume for cross examination.

[fol. 256] And also, WILLIAM E. FOWLER, resuming the stand, continued his testimony as follows:

Cross-examined by Mr. Fitzpatrick.

Q. Mr. Fowler, as I understand your testimony, the weight as shown in the waybills are all estimated weights?

A. That is right.

Q. Who made the estimates of those weights?

A. The representative of the Pittsburgh Coal Company in connection with one of the P. L. & W. men examined the cars and estimated the weight.

Q. Did the P. L. & W. man make the estimate or did the Pittsburgh Coal Company?

A. Well I can't say as to that. They agreed between them right on the ground.

Q. Is it safe to say that probably the weights are those given by the Pittsburgh Coal Company?

A. It might be.

Q. You don't know whether the weights are reasonably accurate or whether they aren't?

A. Well, they are reasonably accurate because these two fellows endeavored to get as near an actual weight as they could.

Q. But the point is you took those estimated weights——

A. The cubic capacity of those cars can be figured with the known weight of coal and it can be estimated almost exactly.

Q. Now can you tell from the exhibits that were introduced this morning the length of time that the cars in which the coal is now loaded were in the possession of the Pittsburgh Coal Company at Brush Run?

A. Yes.

Q. Would you mind stating the fact on that point?

A. One of these cars was—do you want the numbers, Mr. Fitzpatrick?

[fol. 257] Q. If you will just state the range of the days that would satisfy me.

A. One of the cars was placed empty on September 14 and it was billed out loaded on September 17. Three of the cars were placed empty on September 13th and they were billed out loaded on September 17th.

Q. From the 13th to the 17th, that is at least three full working days, isn't it?

A. Yes.

Q. Did you charge demurrage on those three cars?

A. We did not.

Q. Isn't demurrage applicable under the tariffs?

A. Well the demurrage is governed by the A. R. A. demurrage tariff to which we are a party.

Q. And that calls for the payment of demurrage beyond 48 hours, does it not?

A. Not according to our interpretation.

Q. How do you understand the tariff?

A. These coal cars come under the exception in the demurrage tariff.

Q. And the exception only applies in respect of cars awaiting loading at mines, isn't that true?

A. Or cars that are loaded on mine tracks.

Q. At a mine?

A. Or at a coal washer.

Q. Now don't you regularly interchange interstate and intrastate traffic with the P. L. & W., that is, the Y. & S. and the P. L. & W. at Signal?

A. Regularly interchange interstate and intra-state?

Q. Yes.

A. Yes.

Q. As I understood your testimony this morning, the only knowledge on which you relied in contending that intra-state rates were applicable on these shipments was the presence of a waybill tendered to the Y. & S. at Signal [fol. 258] showing the origin point as Negley, Ohio, is that true?

A. Well it depends upon whether you are talking to me personally as a representative of the P. L. & W. or the Y. & S. We depend upon, in our interpretation of this traffic as intra-state traffic, on the fact that we were given a shipping order for that car of coal which was tendered to us for shipment at Negley, Ohio, with the destination in Ohio.

Q. Who is "we"? The Youngstown & Suburban is the one that filed the complaint. I am asking about what actual knowledge the Youngstown & Suburban Railroad had when it filed this complaint alleging that intra-state rates were applicable.

A. We had a copy of the waybill, we had the original waybill which goes with the car.

Q. And that was the utmost by way of information that you had influencing you that intra-state rates were applicable?

A. As far as the Youngstown & Suburban Railway is concerned, yes.

Q. Well did you go beyond that to acquire any information at all?

A. Are you talking about me personally or representative of the Youngstown & Suburban?

Q. The president ought to be able to speak for the company.

A. No, we didn't go beyond that because the waybill is made up by the agent at the point of origin and unless he falsifies the billing the waybill is correct. If that shows that car originating at Negley, Ohio, that is where it originated.

Q. But the point was the waybill was the only information that you absolutely had that led you to believe it was intra-state traffic?

A. That is right.

Q. And is that also true of your company, the complainant here?

A. I thought you were asking me the question regarding our company. I am speaking for myself or the company either one.

[fol. 259] Q. All right. Mr. Fowler, I show you the uniform demurrage rules tariff filed with the Interstate Commission and also various state commissions, including Ohio, and I will ask you if you will kindly refer me to the exception in behalf of the Pittsburgh Lisbon & Western authorizing a waiver of demurrage in respect of coal cars held beyond 48 hours.

A. I don't need to refer you to any waiver in behalf of the Pittsburgh Lisbon & Western. The general provisions in the tariff cover this situation without a waiver being necessary.

Q. Will you kindly refer to the tariff and refer me to the provisions that authorize that?

Commissioner Schaber: Is that a question of any importance in this case?

Mr. Fitzpatrick: It is indirectly, Mr. Commissioner. We have here the child of a great state parent and the

child is going out of its way to favor the parent, not only in contending here as to what charges are applicable but also in respect of its own practices in the way of handling cars and according other privileges that generally are not accorded shippers.

Mr. Gutheim: Well, I ask that the charge of favoritism of the father to the child be stricken from the record because I am sure that Mr. Fowler will now show Your Honor where the exception is, and, as a matter of fact, this matter was taken up by the Demurrage Bureau of the American Railway Association with the Pittsburgh Lisbon & Western and it is all straightened out, as Mr. Fowler put it.

Mr. Day: We would rather have the testimony to that than your word for it.

Mr. Gutheim: All right, you will get it.

[fol. 260] The Witness: On page 37 of this tariff, which is freight tariff number 4-O, I. C. C. No. 2731, Ohio number 1564, the tariff is the American Railway Association Tariff Bureau, B. T. Jones, Agent, naming car demurrage rules and charges and storage rules and charges, issued August 20th, 1934, effective October 1st, 1934,——

Q. Now are you going to refer me to the page and item which covers that?

A. On page 37, Rule 1.

Q. What does the pertinent part of the rule say?

A. Wait just a minute. Rule 1, section B, item 3, reads: "Empty cars placed for loading coal, coal blocks, coal brickettes or coal boulets, at coal mines, coal mine sidings or coal washers or for loading coke at coke ovens, when the washers or overs are located at or adjacent to the mines producing the coal to be washed or to be used in making coke, and such cars under load with such commodities at such mines, mine sidings, coal washers or coke ovens."

Note two under this same paragraph reads as follows: "Coal washers and coke ovens shall not be considered as adjacent to coal mines when the coal to be washed or to be used in making coke is moved from the mines to the washers or coke ovens under freight tariff rates."

Under those terms we considered that the cars placed at this coal washery for loading or held under load are exempt from demurrage.

Section A, which should come ahead of what I have already read: "Cars of either railroad or private ownership held for or by consignors or consignees for loading, unloading, forwarding directions or for other purposes (including cars held for loading company material unless the loading is done by the railroad for which the material is intended and on its tracks) are subject to these demurrage rules [fol. 261] except as provided in Section B.

"Section C. The following cars are not subject to these demurrage rules", and then occurs what I read previously.

Now this matter has already been taken up with us by the Eastern Demurrage and Storage Bureau, who have general supervision of the application of this demurrage tariff under the jurisdiction of the car service division of the American Railway Association. We have taken this same attitude with them and we have had advice from them that they do not contest our interpretation of this tariff.

Q. Well, did you advise them that the coal was mined in Pennsylvania, moved down the river and thence over a private railroad, a distance of ten miles, to Negley and that the holding of the empty car occurred after all that service?

A. We advised them that "At Negley, Ohio, there is a washing plant which handles coal from barges on the Ohio River. This coal is moved from the barges to this washing plant over facilities and in equipment owned entirely by the company which operates the washing plant."

Q. Now what is the date of that letter, please, from which you just read?

A. September 24th.

Q. September 24th?

A. That is right.

Q. And who wrote that letter?

A. I wrote it.

Q. At the time you wrote that letter you knew this coal then came from Pennsylvania and through Smiths Ferry, is that true?

A. I don't know where the coal came from. I testified that previously. I am not qualified to say where that coal came from.

Mr. Fitzpatrick: Would there be any objection, Mr. Gutheim, to permitting the inclusion of that letter and the

reply in this record so that we can be clear on this question of demurrage?

[fol. 262] Mr. Gutheim: I don't see as there is any necessity for the letter at all. I think it is entirely clear on the tariff. The tariff specifically defines what is an adjacent washer and it says it is not adjacent if you pay a freight charge in order to get to the washer and there is no freight charge paid here from the mine to the washer.

Mr. Fitzpatrick: Well there might be a lot of question about that. There is an exception to the tariff specifically shown in favor of the Montour Railroad, of which, as I understand it, Mr. Fowler is an officer, and there is no reason for the exception if Mr. Fowler's present construction is true. I think we ought to have the benefit of any inquiry or answer that tends to give validity to the construction which he now attempts to give the tariff.

Mr. Gutheim: I don't believe the interpretation by you or me or by the American Railway Association Demurrage Bureau is going to make any difference one way or the other. The construction of this tariff is a matter of law and the Court is perfectly able to interpret it.

Mr. Fitzpatrick: The letter and answer merely tend to show facts from which we can make a conclusion and from which the Commission can. I think in fairness the Commission should have copies of both.

Commissioner Schaber: He read into the record the particular paragraph pertaining to this matter of demurrage.

Mr. Day: Yes, from the tariff.

Commissioner Schaber: Well, if it becomes necessary for the Commission to interpret it, why, it will have to do so itself, regardless of what the parties here may say one way or the other.

[fol. 263] Mr. Fitzpatrick: If it is a matter, Mr. Commissioner, of giving Mr. Gutheim any trouble we wouldn't want to do that. If Mr. Gutheim will consent I will be glad myself to apply to the American Railway Association for the copies of the letter I requested and also for copies of the reply and within ten days make copies of each a part of the record.

Mr. Gutheim: Well you will find, if you want to do that, as we understand it, these are confidential communications between the Demurrage Bureau and the railroad, but if you want the reference to put it in, Mr. Fitzpatrick, you get first

the letter on which the whole thing started, which was a letter from Mr. J. F. Chalfant, Manager of the Demurrage and Storage Bureau, dated September 21, 1934, circular number 306, addressed to members, and then you can also get Mr. Chalfant's letter of September 28th, 1934, as Manager of the Eastern Demurrage & Storage Bureau, his file number 129, addressed to Mr. W. E. Fowler, president of the Pittsburgh Lisbon & Western Railroad Company and if you want to put it in that is satisfactory to me.

Mr. Fitzpatrick: Could I borrow your copies and then make them up in that way?

Mr. Gutheim: No, you get them from Mr. Chalfant for the reasons I said.

Mr. Fitzpatrick: If that is agreeable I will be glad to do that. I would like to have the copy of the letter that Mr. Fowler wrote to the Bureau and also their reply and make it a part of the record here.

Commissioner Schaber: We will permit you to do that.

Mr. Fitzpatrick: All right, thanks. Later on I take it you will kindly let me see that so that I will know what I [fol. 264] am talking about.

Mr. Gutheim: If Mr. Chelfant wants to give it out——

Mr. Fitzpatrick: No, my question was to say to him I have his permission, that is the point.

Mr. Gutheim: You have his files now. If he wants to give it out as he understands his relations to the railroad, that is for him to say.

Examiner Herrold: I don't see what a letter would have to do with it anyhow. There is nothing governs a demurrage but a tariff and the tariff speaks for itself.

Mr. Fitzpatrick: If it embarrasses these gentlemen I won't even press it any further.

Examiner Herrold: I don't see any use for it in this case any how.

Mr. Day: In the event this record does become important and the Commission sees fit to examine the tariff I think it should have before it item number 125 on page 25, which is the special exception of the Montour Railroad.

Examiner Herrold: Well, the Montour Railroad is over in Pennsylvania.

Mr. Day: I know, but it is the same tariff, it is the same organization and these people are joint officers of both.

Examiner Herrold: Reference to the tariff has been testified to. The Commission will take cognizance of it.

Mr. Fitzpatrick: I have no further questions. Thank you.

[fol. 265] Redirect examination.

By Mr. Gutheim:

Q. Mr. Fowler, is the Youngstown & Suburban Railway Company a member of the Per Diem Rules Agreement of the American Railway Association?

A. Yes.

Q. Is the Pittsburgh Lisbon & Western also a member of that Per Diem Rules Agreement?

A. Yes.

Q. And as such do you interchange cars of other railroads with those two railroads?

A. Yes we do.

Q. Has the percentage of the total business of your railroad done on freight increased in the last two years?

A. Yes, the freight percentage of the total business has increased materially.

Q. When the mine of the Hamilton Coal Company ships does the Hamilton Coal Company have any relation to the Pittsburgh Lisbon & Western, or do they load their cars on the Youngstown & Suburban and deliver their shipping orders to the Youngstown & Suburban?

A. They load their cars on the Youngstown & Suburban and deliver their shipping orders to the Youngstown & Suburban.

Q. This question of what rates would apply for switching this traffic in Youngstown if it is interstate, do you know what those rates would be if the Pennsylvania were to deliver this coal now held under load at Youngstown to the consignee on the Erie and if it assessed charges on the interstate rates?

Mr. Day: Well it seems to me that is wholly irrelevant and immaterial whether the charge was five cents or five hundred dollars; if the movement was interstate it would have to be paid.

Mr. Gutheim: The only question is that these gentlemen stated that they would be glad to put on a witness to furnish [fol. 266] this. I don't know if they are going to put on a

witness to furnish it and if Mr. Fowler knows the Commission indicated it was information of interest and ought to be given.

Commissioner Schaber: Mr. Herrold asked for the information. I haven't any objection to its going in.

Q. What is the answer, Mr. Fowler?

A. Well I don't know the exact rate without looking it up in the tariffs. I don't have the information.

Q. Would the Pennsylvania charge a local rate?

A. Well the rate to be charged would be the first local rate on the Pennsylvania.

Q. That is to the next station beyond?

A. To the next station beyond.

Q. And then would there be a similar rate on the Erie?

A. There would be a similar rate on the Erie Railroad, it would be the first local rate from Youngstown to the next point beyond the point of delivery of this coal.

Q. Do you know the range of those rates?

A. Well they range anywhere from 76 cents a ton to $1.13 a ton.

Q. Each?

A. Yes.

Q. Now has coal been switched by the Youngstown & Suburban to the Pennsylvania for delivery to destinations on the Erie in the past and has that coal been switched by the Pennsylvania and the Erie?

A. Yes.

Mr. Orcutt: I ask that that question and answer be stricken, if the Commission please, unless it is confined to coal from Negley, coal similar to that under consideration here. It is wholly immaterial unless it has been.

Examiner Herrold: I think that it is true that there has [fol. 267] no coal been handled from Negley so far under those rates, isn't it? That is the controversy that is here before us. From other points, say like Rogers or Signal, that is true as I would understand it.

The Witness: Well these four cars of coal are the first shipments of coal from the Pittsburgh Coal Company.

Q. Well were there other cars from other points of origin?

A. Yes, lots of them.

Examiner Herrold: And now in regard to that, coal has originated on the P. L. & W. Railroad at such points as Rogers, as I understand there is a mine there?

The Witness: Yes.

Examiner Herrold: And then shipped over the P. L. & W. in connection with the Youngstown & Suburban and has been delivered to industries on the Erie Railroad in Youngstown at the switching rates that you have mentioned of $2.70 for intermediate hauls for the Pennsylvania and $4.95 a car for the Erie, is that correct?

The Witness: That is correct, and some of that movement has happened within the last week.

Examiner Herrold: And did you issue the same kind of a switching bill known as an interline switching waybill that you issued for these cars that originated at Negley?

The Witness: Same thing identically.

Examiner Herrold: You didn't show the switching charges down in here. It was taken for granted, I suppose, that whatever charge was published in the switching tariff would be paid, would be absorbed by your company?

The Witness: Up to the limit of absorption in our tariff, yes.

[fol. 268] Examiner Herrold: Yes, that is provided for in your absorption tariff, Ohio No. 100, is that correct?

The Witness: That is correct.

Examiner Herrold: Then this slip that you gave them for this Negley haul was no different than you had been giving them for a haul of coal say from Rogers, is that correct?

The Witness: Not in any way. It is just the same kind of a bill.

Examiner Herrold: They have always accepted it in that way, is that right?

The Witness: Yes.

By Mr. Gutheim:

Q. Now in these other instances, Mr. Fowler, were you ever asked to prepay the switching charges beyond the Y. & S. to consignee?

A. No.

Mr. Day: I object to the question as immaterial.

Commissioner Schaber: He may answer.

Q. Did you ever prepay the switching charges from the Y. & S. connection to the consignee?

A. No, that is all a matter of credit between the two companies involved.

Q. Does that come under the phrase "unless otherwise satisfactorily arranged for" as you read in the tariff this afternoon?

A. I presume it does.

Q. Now something was said about other available routes via which coal could move from P. L. & W. origins, first via New Gallilee and the Pennsylvania and again via Lisbon and the Erie. What is the rate from the P. L. & W. mines via those two routes to Youngstown?

A. $1.04 per ton.

Q. As against the rate of 60 cents via Signal and the Y. & S.?

A. That is right.

[fol. 269] Mr. Gutheim: No other questions.

Examiner Herrold: How do the distances compare?

The Witness: Well the distance from Negley to Youngstown by way of the P. L. & W. and Y. & S. is 29 miles. The distance from Negley to Youngstown by way of the Erie Railroad, I can't give it to you from my memory, if I might be allowed to refer to tariffs——

Examiner Herrold: Well, just about?

The Witness: It is between 55 and 60 miles. The distance by way of the Pennsylvania Railroad is approximately 75 miles.

Q. That is via the route of actual movement?

A. That is right.

Mr. Orcutt: What is it via the route of possible movement if this tonnage moved, that is, Negley to New Gallilee and thence New Gallilee to Youngstown?

The Witness: It would be in the neighborhood of between 45 and 50 miles.

Examiner Herrold: Any further questions?

Mr. Gutheim: No further questions.

And thereupon the complainant rested.

And thereupon an adjournment was taken until 10 o'clock A. M., Thursday, October 18, 1934.

[fol. 270] Thursday Morning Session,
October 18, 1934.

Commissioner Schaber: Are you gentlemen ready to proceed? Have you finished with your testimony, Mr. Gutheim?

Mr. Gutheim: Yes, Your Honor, we rested yesterday.

MOTION TO DISMISS

Mr. Orcutt: The complainant having closed, the Defendants and Intervenors desire at this time, after the close of Complainant's evidence, to interpose a motion to dismiss the complaint on jurisdictional grounds for three reasons:

The first is that the record shows conclusively that the traffic here under consideration is interstate traffic and as such this Commission of course has no jurisdiction under the Act;

The second ground is that Section 522 of the Ohio Act itself precludes this Commission from entering any order requiring interchange between steam carriers and electric interurban carriers;

The third reason is that the record and the evidence so far shows that the complainant in this case has no interest, at least not sufficient interest upon which to ground a complaint. The complainant here is merely an intermediate carrier. The delivering carriers in accordance with the billing have the common law right of course to demand prepayment of their charges. In addition to that, their tariffs call for prepayment where desired. And further a notice demanding prepayment was served where the coal is not mined in Ohio.

The complainant here is not interested beyond its status as intermediate carrier. If it wants this lading delivered it could advance the charges in accordance with the tariffs requiring prepayment and in that event either the consignor [fol. 271] or the consignee would have an action for overcharges if they saw fit to proceed. The complainant here has no real interest in this controversy other than being merely a subsidiary or tool of the shipper, the Pittsburgh Coal Company.

Examiner Herrold: What was your first ground?

Mr. Orcutt: The record shows conclusively and indisputably that this traffic was interstate traffic, having originated in Pennsylvania intended to be delivered in Ohio and as such traffic this Commission of course has no jurisdiction of it.

Examiner Herrold: Of course that is the point at issue.

Mr. Orcutt: Yes.

Commissioner Schaber: We do not feel prepared to rule on that motion at this time, because that involves the very question to be disposed of. You may save your exceptions. I take it that if the motion be overruled you would have some testimony to offer. Have you, or did you want to just submit it on this motion?

Mr. Orcutt: Your Honor will recall that at the opening yesterday we were uncertain as to the amount of evidence which would be necessary. The amount of evidence which we felt would be necessary was dependent entirely upon how frankly the complainants presented the facts. After Mr. Morrow took the stand and explained all of the facts as we understood them and as we intended to show them by secondary evidence if the Pittsburgh Coal Company refused to present the best evidence, we discussed the matter last night and came to the conclusion that the evidence that we had would very largely be merely a repetition and cumulative of Mr. Morrow's statement. That being the case we didn't wish to tax the time of this Commission by putting in merely cumulative evidence. The defendants and intervenors therefore will rest upon the record as it is and [fol. 272] upon our motion as just made.

I might add that I advised the complainants last evening of our conclusion so that they would not be inconvenienced by remaining here overnight for this morning's session unless they so chose.

Commissioner Schaber: Well then the matter will be taken under consideration by the Commission. As I stated, we are not prepared to rule on that motion at this time. I assume the attorneys desire either to argue or to submit briefs on the question.

Mr. Gutheim: Before reaching that question of briefs and arguments I desire to move that the order prayed for

be entered forthwith, the record showing that the traffic is wholly intrastate, that the statute expressly authorizes the complaint by the complainant and there being no evidence by the defendants to indicate anything to the contrary, that the traffic is intra-state.

Commissioner Schaber: Well would there be any objection to an order being entered that these cars be moved and delivered and the matter of the rate and tariff be adjusted later as to these cars without establishing any precedent as to future movements?

Mr. Orcutt: We would have no objection whatever, if Your Honor please, to the entry of an order requiring us to move these upon the interstate basis, the charges being prepaid, subject of course to refund at any time when this case is finally concluded. In that way we would be fully protected. In the other way we would not be protected at all. If we delivered them on the state basis and this Commission or the Supreme Court ultimately determined that this was interstate traffic we would have no means of recouping other than to start another legal proceeding to [fol. 273] collect the full amount of our interstate charges under the tariff. The way I have suggested would take care of the matter adequately and the money would be there subject to refund upon final determination.

I desire to call the Commission's attention to the fact that an order forthwith certainly cannot be entered until our motion has been disposed of, and as the Commission has just remarked that the motion encompasses the whole case, so I don't see how any order such as Mr. Gutheim has suggested can be entered until the case is determined.

Now I would like to ask Mr. Gutheim, who I assume has made that motion on behalf of the complainant, the Youngstown & Suburban Railway, and not the Pittsburgh Coal Company, just why he makes that motion, why he wants this delivered and what good it would do the Youngstown & Suburban Railway Company if we delivered them today? Their rights are not prejudiced one way or the other as I understand the case.

Commissioner Schaber: I am rather inclined to the view that an order couldn't issue in view of the motion that is made here, which of course would be decisive of the case, but I was hoping that there might be some arrangement between the parties whereby these cars could be moved and

deliveries made to the consignee and the matter of adjusting the rate could be deferred until final decision of this action. I would like to consider the public that is asking for this coal.

Mr. Orcutt: I should add, perhaps, if the Commission please, that my suggestion that the interstate charges be advanced and the coal delivered was made with the thought that that would be done without prejudice to this case and without influencing the issues here in any way. We would [fol. 274] not take advantage of that, and any time the case was finally determined we would abide by that final determination and voluntarily refund the difference or keep it as the decision might direct.

Mr. Day: Mr. Commissioner, I don't understand your statement with respect to the public interest in this case when the public is not here. Even the consignee, who presumably would have some interest in the proceeding, isn't here. The only parties we have here are the subsidiaries of the Pittsburgh Coal Company.

Commissioner Schaber: Well, I take it that there is nothing in the record to indicate but what this shipment was made in good faith and the consignees were purchasing coal and desire coal for their use and whether they are here or not I believe the movements ought to be permitted if it can be done within legal rights to all parties.

Mr. Day: Of course the right hinges on whether it is interstate commerce. If it is this Commission certainly has no interest in the transaction at all. Even as a body sitting here to look after and protect the public interest you have no interest, you would have no concern in a movement that was purely interstate. The remedy there would be in the courts or with the Interstate Commerce Commission.

Commissioner Schaber: Well, I wasn't assuming to take any particular jurisdiction of the question. I was just making the suggestion to the parties if it could be adjusted along some lines that might be satisfactory to all.

Mr. Gutheim: Mr. Commissioner, might I say first of all that the only parties who are here are the Youngstown & Suburban Railway Company, which is the only party I represent, the Pennsylvania and the Erie as defendants and [fol. 275] such other carriers as have come in as intervening defendants. I am not here representing the Pittsburgh Coal Company or anybody other than the Youngstown & Suburban Railway Company.

Now as to the interest of the Youngstown & Suburban Railway Company, I don't propose to take up the time of the Commission to discuss that or any other feature of the motion which the defendants have made. There will be time enough to do that if the matter of submitting the case is to be deferred one way or another. I don't see any reason why it should be deferred myself.

But so far as the actual payment of these interstate charges on these cars is concerned, that is something we will not do. The lawful charges, as we understand the law and as we know the facts, are the charges stipulated by the tariffs on file with the Ohio Public Utilities Commission and we will pay nothing more than that until this case is determined in such a way as makes it impossible to accept any other conclusion.

Now, as to any arrangement which might permit these four cars to be moved meanwhile, there is this to be said, all of us have had some experience with cases becoming moot and I for the client I represent don't propose to take any chance on having these four cars moved and then having the parties on the other side or having some court of its own volition say that the case has become moot.

Commissioner Schaber: Well, your motion will be overruled at this time or denied at this time, Mr. Gutheim.

Mr. Orcutt: I understand then the complainant doesn't want these cars moved under any circumstances until this case is determined. That ends that question.

[fol. 276] Mr. Gutheim: The complainant is perfectly willing to have you move these cars as intra-state commerce.

Commissioner Schaber: Well that motion has been denied. What do the parties have to say as to how you desire to present the matter further upon argument or briefs?

Mr. Gutheim: I am perfectly willing to argue the case orally and submit it now.

Commissioner Schaber: Well I would prefer that this matter, if it is argued, be argued to the full membership of the Commission.

Mr. Gutheim: Well I am entirely willing to argue it to the full membership of the Commission at as early a date as Your Honor can fix.

Mr. Orcutt: The defendants and intervenors desire to file a brief and do not request argument but are perfectly willing to if the Commission desires argument and thinks

it would be helpful. We do desire to file briefs, however. We think we can put our entire case in the brief.

Commissioner Schaber: You would also file a brief?

Mr. Gutheim: I would also file a brief, but in the interests of getting this case along I suggest that if your Commission could fix a date within the next week in which they could have oral argument we could have argument then and submit briefs within ten days.

Commissioner Schaber: It might be well to have briefs before the oral argument. It would be helpful to the members of the Commission in following your argument if they had the briefs on file.

Mr. Gutheim: Well then I suggest, Your Honor, that the date for briefs be made as early as possible.

[fol. 277] Commissioner Schaber: How long time will you want?

Mr. Gutheim: Ten days would be sufficient.

Examiner Herrold: You won't get the transcript of the testimony before about a week.

Mr. Gutheim: Well even so these gentlemen have issued an order in which they have provided that these cars are not to be accepted and I take it that they didn't do that without first getting primed on the law, so I assume that they are primed on the law and can write a brief and I don't see——

Commissioner Schaber: How much time will you want to reply?

Mr. Orcutt: Well we want—I assume that Mr. Gutheim's brief is to be filed and then we are to reply to it?

Commissioner Schaber: Well now just this thought occurred to me, why not have both sides file their briefs in ten days and if either party desires to reply to the other they may do so within a week?

Mr. Orcutt: I don't think, if the Commission please, that we could possibly file it within ten days. I think it is going to require us at least twenty days after we receive the transcript. Mr. Gutheim, I assume, had this brief all written before this coal ever went through the washery, he knew it was going through there and he knew it was a test case and he knew what was going to happen. We didn't know anything about this case until a complaint was filed upon us October 6th. At that time I was away from the office and didn't see it until the following week. We have had no opportunity to prepare any brief at all and I think——

Commissioner Schaber: Well, will 20 days be sufficient for you?

Mr. Orcutt: Twenty days after receipt of the transcript [fol. 278] will be sufficient.

Examiner Herrold: The reporter says it will take a week to get the transcript out.

Mr. Gutheim: I think, Your Honor, that considering the fact that this is a case that involves not merely the establishment of rates for some time in the future but a case where the whole operation of a large industrial enterprise is being held up, and in view of the fact that these gentlemen at least were sufficiently well heeled on the law so that they thought they were justified in issuing a circular which has precluded transportation and to also consider themselves sufficiently well heeled on the law so that they can make the motion that they did this morning, that they don't have to go out and study the law very much now and 20 days from date is ample time i to file a brief.

Mr. Orcutt: I would suggest, if the Commission please, 30 days from this date or 20 days after receipt of the transcript. I don't see how we can do it sooner. We have many other cases than this of course to look after.

Commissioner Schaber: The parties will be granted thirty days to file a brief.

Mr. Gutheim: What is that, Your Honor?

Commissioner Schaber: Thirty days will be allowed from this date for the filing of briefs. Now in filing briefs you will appreciate that the parties will each prepare what occurs to each side to be the finding- of facts and then the law that might apply to those findings of facts as shown by the record in this case. That of course will not bind the Commission to accept either finding of fact, but we would like to have the respective parties prepare their own find- [fol. 279] ings of facts from which we might conclude as to what the law may be applicable to their version of facts.

Mr. Orcutt: Do you wish those accompanied by conclusions of law that we may think should be made also?

Commissioner Schaber: Yes. That is to accompany your brief of course.

Mr. Orcutt: Yes. We can make it a part of it, may we not?

Commissioner Schaber: That is right. Well, there is nothing further than this morning.

Mr. Gutheim: Then I take it, Your Honors, that it will be submitted on the briefs and there will be no oral argument?

Commissioner Schaber: Well I will consult the other Commissioners on that as to whether they desire to hear any argument after the briefs have been submitted.

Mr. Gutheim: Well it is satisfactory to me to submit it either way but I would like to make this suggestion, that thirty days from today is going to bring us right up to about the 20th of November. I know that Mr. Orcutt is going to be in attendance on the hearings of the Interstate Commerce Commission Ex Parte 115 at Chicago beginning on the 16th. Probably I shall be there. I know that Mr. Orcutt is going to be in attendance on the same hearings in Washington beginning on November 26th and I shall be there. And in between I have one day at least at Winston-Salem, North Carolina on November 20th. So that if we are going to have oral argument days there may be some difficulty in having the case submitted very promptly, and therefore it seems to me it might be submitted well on briefs.

Commissioner Schaber: Well that may be the final method of considering the case on briefs. I don't know how [fol. 280] the other Commissioners might feel about it, whether they would care to sit in to hear oral arguments. We may then take the case on briefs and dispense with any oral argument.

Mr. Orcutt: I am in a more fortunate position than Mr. Gutheim. I have colleagues here who can argue it more ably than I can who won't be involved probably in 115.

Commissioner Schaber: Well there well be no oral argument unless the Commission calls for it.

Examiner Herrold: To the carriers in I. & S. 142 and Complaint Docket 8833, this case intervening just now and coming up among other things that are very important, I wonder if we find that it would be almost impossible for us to dispose of that consolidated proceeding, if you would be willing to suspend for a further period in I. & S. 142?

Mr. Orcutt: I am sure we would certainly, if Your Honor please, any time that the Commission finds itself——

Examiner Herrold: If we need say 60 days more will it be agreeable with the parties?

Mr. Orcutt: If the Commission desires that much time we will be glad to accede to the convenience of the Commission at any time.

Examiner Herrold: It may be that we won't, but if we do I just am glad to have you offer to voluntarily further suspend for say a period of 60 days.

Mr. Orcutt: And if you will write a letter to me with a copy of it to Mr. Kerns at any time suggesting the date to which you desire the suspension voluntarily extended we will be very glad to do it. I suggest a copy to Mr. Kerns because it so happens that I am out of the office for a week at the time on some other matter and it might delay it just [fol. 281] too long if it didn't get to me until I came back.

Examiner Herrold: We will arrange to do that.

Mr. Gutheim: Is that the matter, Mr. Examiner, on which the proposed finding of facts and conclusions of law are now due to be filed on November 20th?

Examiner Herrold: Yes, that is the case, and those are due on the 20th of this month.

And the foregoing are all of the proceedings and testimony had on this hearing of this cause.

(Here follow 2 photos, folios 282 and 283.)

EXHIBIT 1

ennsylvania Railway Co. Exhibit No. 3.

V. & S.vP.R.R. & Erie, Ohio, Docket 9113.

THE PITTSBURGH, LISBON & WESTERN RAILROAD COMPANY
CONDUCTOR'S WHEELAGE REPORT Sheet No._____

Train No. W.Extra Direction West Division Engine From To Miles
Left NGalilee At 9:20 A.M. Sept.14,1934, 16 N.Galilee Lisbon 23
Arrived Lisbon At 1:25 P.M. Sept.14,1934, 16 " "

Conductor Kennedy Engineer Graebing

Brakeman Byers & Inman Fireman Jenkins.

No. Cars	Initial of Car	NUMBER OF CAR Loaded	Empty	Kind	Commodity	Taken At	Left At	North or East Door
1	PLW	502		H	Coal	2	40	
2.	PRR		37439	B	E	0	33	
3	PRR		896922	H	-	0	30	
4	PRR		166959	H	-	0	30	
5	PRR		145853	H	-	0	30	
6	PRR		146720	H	-	0	51	
7	PRR		200451	H	-	0	51	
8	PWV	035		H	Coal	2	74	
9	PRR		538210	B	E	0	80	
10	PRR		46536	B	-	0	80	
11	PRR		46196	B	-	0	80	
12	PRR		531146	B	-	0	80	
13	PRR		40139	B	-	0	80	
14	PWV	2105		H	Coal	0	80	
15	PRR	569386		B	Mdse	0	94	24225 - 24183
16	PRR	517383		B	Lime	0	14	8421 - 8413
17	NYC		424741	H	E	12	74	
18	NYC		454254	H	"	12	74	
19	PRR	567893		B	Clay	30	74	
20	NYC		413230	H	E	40	74	
21	CCCStL		79123	H	-	40	54	
22	PMCKY	61501		H	Clay	54	87	
23	Erie	94885		B	SPipe	80	87	

No. Loads 8 No. Empty 15

Initial of Car	Car No.	From	To
PLW	5	New Galilee	Lisbon

282

1924

EXHIBIT 2

THE PITTSBURGH, LISBON & WESTERN RAILROAD COMPANY

Received, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading, at

(Negley, Ohio) Brush Run plant Sept. 17, 1934

from Mine 30 Pgh. Coal Co.

the property described below:

Consigned to Youngstown Ice Co. (Haselton Yard)

Destination Youngstown State of Ohio

Route P.L. & W. - Y & S. - Erie Delivery

Car Initial CCC & St.L. Car No.79.

No. Packages	Description of Articles. Special Marks and Exceptions	Weight Subject to Correction
1	C/L Furnace Coal	100000

(Freight Prepaid)

Received $30.00 to apply in prepayment of the charges on the property ~~of~~ described hereon.

E.J.M.
Agent or Cashier.

Pgh. Coal Co. Mine #30 Shipper E.J.Murphy Agent.

Per J.D.Yourd.

283

1928

[fol. 284] EXHIBIT 3—Fowler

The Pittsburgh, Lisbon & Western Railroad Co.

Freight Waybill

Car Initials and Number	Date	Waybill No.
CCC & St L 79123	Sept. 17, 1934	C-4

To Station
Youngstown, Ohio

From Station
No. ( ) Negley, Ohio.

Route
Signal Y&S Erie Delivery

Full name of shipper
Pittsburgh Coal Co.

Consignee, Address (Final destination and additional routing)
Youngstown Ice Co.
Harleton Yard
Youngstown, Ohio
Erie Delivery.

Description of Articles and Marks	Railroad	Weight	Rate	Freight	Prepaid
1 C/L Furnace Coal	E	100 000	60	30.00	30.00

(Here follows 1 photo, folio 285)

EXHIBIT 4

THE PITTSBURGH, LISBON & WESTERN RAILROAD COMPANY
CONDUCTOR'S WHEELAGE REPORT SHEET NO. 1.

Train No. Ext.1 Direction West Division Engine From To

Left Galilee At 9.33 A.M. Sept.17th,1934 17 N.Galilee Lisbon

Arrived Lisbon At 2.50 P.M. Sept.17th,1934

Conductor Byers Engineer Graebing

Brakeman Young & Inman Fireman Jenkins

No. Cars	Initial of Car	Number of Car Loaded	Empty	Kind	Commodity	Taken At	Left At	North or East door	
1	UTLX	51684		T	Tar	0	38		
2	PRR		263839	H	E	0	72		
3	PRR		146090	H	E	0	51		
4	PRR		214166	H	E	0	51		
5	PRR		714529	H	E	0	51		
6	PRR		43149	B	E	0	33		
7	PRR		263762	H	E	0	30		
8	PRR		157034	H	E	0	30		
9	PRR		168000	H	E	0	30		
10	PRR		201948	H	E	0	30		
11	PRR		685198	H	E	0	30		
12	P&WV	3926		H	Coal	0	80		
13	P&WV	3629		H	- -	0	80		
14	PL&W		600	H	E	1	72		
15	CP	171009		B	Mdse	0	94	7374	7369
16	P&LW		309	F	E	10	17		
17	PRR	45847		B	Br	11	174		
18	Big 4		79015	H	E	12	174		
19	NYC		422944	H	E	12	174		
20	NYC		424696	H	E	12	174		
21	Big 4		80964	H	E	12	174		
22	NYC		417200	H	E	12	174		
23	NYC		418822	H	E	12	174		
24	PL&W		501	H	E	38	37		
25	PRR	50538		B	Tile	40	174		
26	Big 4	79123		H	Coal	54	174		
27	P & L.E	50767		H	--	54	174		
28	MC	10990		H	--	54	174		

No. Loads 9 No. Empty 19

PL+W 49S Interchange at Legonier, Pa

285

1944

[fol. 286] The Pittsburgh, Lisbon & Western Railroad Company

Conductor's Wheelage Report

Sheet No. 2

Train No. Ext. 1. Direction West Division Engine From To
Left Galilee At 9.33 A. M. Sept. 17th, 1934 17 N. Galilee Lisbon
Arrived Lisbon At 2.50 P. M. Sept. 17th, 1934
Conductor Byers Engineer Graebing
Brakeman Young & Inman Fireman Jenkins

No. Cars	Initial of Car	Number of Car: Loaded	Number of Car: Empty	Kind	Commodity	Taken At	Left At
1	Big 4	82713		H	Coal	54	174
2	PRR		518926	B	E	C	54
3	PRR		84515	B	E	0	94
4	PRR		44136	B	E	0	80
5	PRR		33286	B	E	0	80
6	Erie	94811		B	S Pipe	80	87

No. Loads 2 No. Empty 4

Initial of Car	Car No.	From	To
PL&W	5	N. Galilee	Lisbon

[fol. 287]

EXHIBIT No. 5

Witness Fowler

Daily Interchange Report of Cars

From The Pittsburgh, Lisbon & Western R. R. Co. To Y & S R. R.

Date Sept. 18, 1934.

Sheet No. 12.

At Signal O
From 12:01 A. M. to 11:59 P. M.

Marks	Number Loaded	Number Empty	Kind	Date	Delivered By	At Station	Hour	Point of Shipment	Final Destination	Contents
P&LE	50767		H	9/18	P. L. & W. R. R. Co. to Y. & S.	Signal O	11P	Negley O	Yo. O.	Coal
B/4	79123		H	9/18	P. L. & W. R. R. Co. to Y. & S.	Signal O	11P	"	"	"
MC	10990		H	9/18	P. L. & W. R. R. Co. to Y. & S.	Signal O	11P	"	"	"
B/4	82713		H	9/18	P. L. & W. R. R. Co. to Y. & S.	Signal O	11P	"	"	Clay
PRR	518926		B	9/18	P. L. & W. R. R. Co. to Y. & S.	Signal O	11P			Mty
B/4		66429	H	9/18	P. L. & W. R. R. Co. to Y. & S.	Signal O	11P			Mty
NYC		424213	H	9/18	P. L. & W. R. R. Co. to Y. & S.	Signal O	11P			"
NYC		416445	H	9/18	P. L. & W. R. R. Co. to Y. & S.	Signal O	11P			

M. A. Youd, Agent.

EXHIBIT No. 6—Fowler

The Youngstown and Suburban Railway Company
Conductor's Wheelage Report
Sheet No.

Sept. 18–19–1934.

Locomotive Number	From	To	Time Leaving	Time Arriving	Miles
100	CB	Sig	7:20P	9:52P	21.15
100	SIG	TF	10:08P	1.00A	21.15
100	TF	Fairfield	1.55A	3.05A	19.15
100	Fairfield	TF	3.10A	4.20A	19.15
100	TF	CB	5.15A	5:20A	
					80.60

Engineer Coler Conductor Vollnogle Brakeman Sitler Brakeman Haas

No. Cars	Initials of Cars	Car Numbers Loaded	Car Numbers Empty	Kind	Commodity	Tons	Taken At	Left At	Mileage Loaded	Mileage Empty	North or East Door	Hour placed
1	NYC	424141		H	Coke	28	2	56	108			8:25P
2	NYC	419785		H	Stone	55	2	120	980			9:20P
3	MC	10990		H	Coal	47	174	15	2115			1:02A
4	PLE	50767		H	Coal	52	174	15	2115			1:02A
5	B4	82713		H	Coal	52	174	15	2115			1:02A
6	B4	79123		H	Coal	50	174	15	2115			1:02A
7	PRR	518926		B	Clay	..	174	2	2115		87736–87737	1:15A
8	B–O		426010	H	E		19	15				1:48A
9	B4		66429	H	E		174	2		2115		1:15A
10	NYC		424213	H	E		174	2		2115		1:15A
11	NYC		416445	H	E		174	2		2115		1:15A
12	C–o		63546	H	E		75	15		373		1:02A
13	Erie		97218	B	E		59	15		108		4:20A
14	NYC		401803	H	E		170	2		1915		1:15A
15	NYC	404818		H	Slag	53	2	170	1915			3:05A
16	S–P		16245	B	E		34	15				1:48A
17	B–O	111042		S	Cattle	12	15	44			38780–38788	4:30A

Initial of Car	Car No.	From	To
PLW	4	Car Barns	Signal
"	"	Signal	Car Barns
"	"	Car Barns	Fairfield
"	"	Fairfield	Car Barns

8060

197

[fol. 289] EXHIBIT No. 7—Fowler

Daily Interchange Report of Cars
From The Youngstown and Suburban Ry. Co. to Penna. R. R.

At Yo.O. Date Sept. 19, 1934.
From 12:01 A. M. to 11:30 P. M. Sheet No. 19

Marks	Number Loaded	Number Empty	Kind	Date	Delivered By	Hour	Point of Shipment	Final Destination	Contents
MC	10990		H	9/19		1:02A	Negley O	Erie RR Yo	Coal
PLE	50767		H	9/19		"	"	"	"
B4	82713		H	9/19		"	"	"	"
B4	79123		H	9/19		"	"	"	"
B–O		426010	H	9/19		1:48A	Y&S	PRR	Mty
C–O		63546	H	9/19		1:02A	"	"	"
Erie		97218	B	9/19		4:20A	"	"	"
SP		16245	B	9/19		1:48A	"	"	"
B–O		111042	S	9/19		8:54P	"	"	"
ARL		14924	R	9/19		9:20P	"	"	"

I certify that these Cars were Received as above. C. H. McFarland, Agent, Penna. R. R. J. W. Horn, Agent.

[fol. 290] EXHIBIT No. 8—Fowler

The Youngstown and Suburban Railway Company
Interline Switching Waybill

Date 9/18/34 Waybill No. LS–6
Youngstown, Ohio.

CCC & St L. Car 79123
To Youngstown Ice Co. Haselton Yard.
On Erie R. R.
Via P. R. R.
From Y&S Interchange Track.
Shipper Pittsburgh Coal Co.
Original Point of Shipment Negley, Ohio
Consignee Youngstown Ice Co.
Destination Youngstown, O.
Route PL&W—Y&S Erie Delivery
Contents Furnace Coal
Weight 100000 Rate .60 T
Weight
Net 1,000,000

Revenue Waybill Reference

From or To Negley, O. Billing or destination Road PL&W
Date 9/17/34 Waybill No. C–4 Freight charges 30.00
Route PL&W—Y&S—Erie Delivery.

[fol. 291] EXHIBIT No. 9

The Pittsburgh, Lisbon & Western Railroad Company

Conductor's Wheelage Report

Sheet No. 1

Train No. W. Extra	Direction West	Division	Engine	From	To	Miles
Left N. Galilee	At 8:50 A.M.	Sept. 13, 1934	16	N Galilee	Lisbon	23
Arrived Lisbon	At 1:25 P.M.	Sept. 13, 1934	16	"	"	

Conductor Kennedy Engineer Graebing
Brakeman Byers & Inman Fireman Jenkins.

No. Cars	Initial of Car	Number of Car Loaded	Number of Car Empty	Kind	Commodity	Taken At	Left At	North or East Door
1	PLW		603	H	E	1	37	
2	PRR		40220	B	—	0	54	
3	PRR		518107	B	—	0	54	
4	PRR		567111	B	—	0	94	
5	PRR		55707	B	—	0	37	
6	PRR		159366	H	—	0	30	
7	PRR		893068	H	—	0	30	
8	PRR		897906	H	—	0	51	
9	PRR		215210	H	—	0	51	
10	PRR		675482	H	—	0	51	
11	PRR		32115	B	—	0	80	
12	PRR		564853	B	—	0	80	
13	PRR		32072	B	—	0	80	
14	PRR		42844	B	—	0	80	
15	PRR		34781	B	—	0	80	
16	PRR		43856	B	—	0	80	
17	PRR		893757	H	—	0	30	
18	CN	510531		B	Mdse.	0	94	24293–24351
19	PMCKY		61501	H	E	12	54	
20	MC		10990	H	—	12	54	
21	CCCSt L		82713	H	—	12	54	
22	MC		10859	H	—	40	54	
23	PLE		50767	H	—	40	54	
24	Erie	92613		B	Clay	54	87	
25	NYC	424213		H	Slag	74	83	
26	NYC	416445		H	"	74	83	
27	Erie	94081		B	S Pipe	80	87	

No. Loads 5 No. Empty 22

[fol. 292] Ex. 10

This Memorandum is an acknowledgment that a bill of lading has been issued and is not the original bill of lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

The Pittsburgh, Lisbon & Western Railroad Company

Received,
at Negley, Ohio. Sept. 17, 1934.
From Pgh. Coal Co. Mine #30
the property described below:
Consigned to Republic Rubber Co.
Destination Youngstown, Ohio.
Delivering Carrier P. L. & W. Y & S. Erie Delivery Car Initial MC Car No. 10990

No. Packages	Description of Articles, Special Marks, and Exceptions.	Weight, (Subject to Correction.
1	C/L Nut Stoker & Slack Coal (Freight Prepaid	94000

Received 28.20 to apply in prepayment of the charges on the property described hereon.
E.J.M. Agent or Cashier.

Pgh. Coal Co. Mine #30 Shipper.
Per J. D. Yourd

E. J. Murphy Agent.

[fol. 293] Ex. No. 11

The Pittsburgh Lisbon & Western Railroad Co.
Freight Waybill

Car Initials and Number
MC 10990

Date Sept. 17, 1934. Waybill No. C-1

To Youngstown, Ohio — Station — From — Station Negley, Ohio.

Route
Signal Y&S Erie Delivery

Full name of shipper
Pittsburgh Coal Co.

Consignee, Address
Republic Rubber Co.
Youngstown, Ohio
Erie Delivery.

Description of Articles and Marks	Rail-Road	Weight	Rate	Freight	Prepaid
1 C/L Nut Stoker & Slack Coal	E	94000	60 Net	28.20	28.20
80 M Cap Car Ordered					

[fol. 294] Ex. No. 12

The Youngstown and Suburban Railway Company

Interline Switching Waybill

Date 9/18, 1934 Waybill No. LS-3

Youngstown, Ohio
M. C. Car 10990

To Republic Rubber Company
On Erie R. R.
Via Pennsylvania R. R.
From Y & S. Interchange
Shipper Pittsburgh Coal Co.
Original Point of Shipment Negley, Ohio
Consignee Republic Rubber Co.
Destination Youngstown, Ohio.
Route P. L. & W.—Y & S.—Erie Delivery
Contents Nut, stoker & slack coal
Weight 94000 Rate .60 T

Weight
Net 94000

Revenue Waybill Reference

From Negley, O. Billing or destination road P. L. & W.
Date 9/17/34 Waybill No. C-1 Freight charges 28.20
Route P. L. & W.—Y & S.—Erie Delivery

[fol. 295] Ex. No. 13

This memorandum is an acknowledgment that a bill of lading has been issued and is not the original bill of lading nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

The Pittsburgh, Lisbon & Western Railroad Company

Received,
at Negley, Ohio Sept. 17, 1934.
from Pgh. Coal Co. Mine #30
the property described below:
Consigned to Republic Rubber Co.
Destination Youngstown, State of O.
Route
Delivering Carrier P. L. & W. Y & S. Erie Dely.
Car Initial CCC & St. L.
Car No. 82713

No Packages	Description of Articles, Special Marks, and Exceptions.	Weight (Subject to Correction)
1	C/L Nut Stoker & Slack Freight Prepaid	104000

Received $31.20 to apply in prepayment of the charges on the property described hereon.
E. J. M.
Agent or Cashier.

Pgh. Coal Co. Mine #30
Per J. D. Yourd

E. J. Murphy, Agent.

[fol. 296] Ex. 14

The Pittsburgh, Lisbon & Western Railroad Co.
Freight Waybill

Car initials and number	Date	Waybill No.
CCC& St L 82713	Sept. 17, 1934	C–2
To Youngstown, Ohio	From Negley, Ohio.	
Route, Signal Y&S Erie Delivery	Full Name of Shipper Pittsburgh Coal Co.	

Consignee, Address
Republic Rubber Co.
Youngstown, Ohio,
Erie Delivery.

Description of Articles and Marks	Railroad	Weight	Rate	Freight	Prepaid
1 C/L Nut Stoker & Slack Coal	E	104000	60 Nt.	31.20	31.20

[fol. 297] Ex. No. 15

The Youngstown and Suburban Railway Company
Interline Switching Waybill

Date 9/18 1934 Waybill No. LS–4
Youngstown, Ohio.
CCC& St. L. Car 82713
To Republic Rubber Co.
On Erie R. R.
Via P. R. R.
From Y. & S. Interchange.
Shipper Pittsburgh Coal Company
Original Point of shipment Negley, Ohio
Consignee, Republic Rubber Company
Destination, Youngstown, O.
Route, P. L. & W.—Y&S—Erie Delivery
Contents Nut, stoker & Slack coal
Weight 104000 Rate .60 T
Weight Net 104000

Revenue Waybill Reference

From Negley Billing Road P. L. & W.
Date 9/17/34 Waybill No. C–2 Freight charges 31.20
Route P. L. & W.—Y&S.—Erie Delivery

[fol. 298] Ex. No. 16

This memorandum is an acknowledgment that a bill of lading has been issued and is not the original bill of lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

The Pittsburgh, Lisbon & Western Railroad Company

Received,
at Negley, Ohio Sept. 17, 1934
from Pgh. Coal Co. Mine #30
the property described below:
Consigned to Youngstown Ice Co. (Hazelton Yard)
Destination Youngstown State of Ohio
Route P. L. & W.—Y&S.—Erie Delivery
Car Initial P. & L. W.
Car No. 50767

No. Packages	Description of articles, Special marks, and exceptions.	Weight (Subject to correction
1	Car Block Coal	104000

(Freight prepaid)

Received $31.20 to apply in prepayment of the charges on the property described hereon.
E. J. M.
Agent or Cashier.

Pgh. Coal Co. Mine 30 Shipper.
Per J. D. Yourd

E. J. Murphy, Agent.

[fol. 298a] Ex. No. 17

The Pittsburgh, Lisbon & Western Railroad Company

Freight Waybill

Car Initials and number
P. & L E 50767
To Youngstown, Ohio,
Route, Signal Y&S Erie Delivery

Date Sept. 17, 1934.
Waybill No. C-3
From Negley, Ohio.
Full Name of Shipper
Pittsburgh Coal Co.

Consignee, Address
Youngstown Ice Co.
Hazelton Yard
Youngstown, Ohio
Erie Delivery

Description of articles and marks	Railroad	Weight	Rate	Freight	Prepaid
1 Car Block Coal	E	104000	60	31.20	31.20

[fol. 299] Ex. No. 18

The Youngstown, and Suburban Railway Company

Interline Switching Waybill

Original
Date 9/18/34 Waybill No. LS–5
Youngstown, Ohio, Station.
P.&LE Car 50767
To Youngstown Ice Co. Hazelton Yard
On Erie R. R.
Via P. R. R. Co.
From Y. & S. Interchange.
Shipper Pittsburgh Coal Co.
Original Point of shipment Negley, Ohio
Consignee Youngstown Ice Co.
Destination Youngstown, Ohio
Route P. L. & W.—Y&S.—Erie Delivery
Contents Block Coal
Weight 104000 Rate .60 T
Weight Net 104000

Revenue Waybill Reference

From Negley, O. Billing Road PL&W
Date 9/17/34 Waybill No. C–3 Freight charges 31.20
Route PL&W—Y&S.—Erie Delivery

[fol. 300] Pennsylvania Railway Co. Exhibit No. 4

The Public Utilities Commission of Ohio,
Columbus, Ohio

October 29th; 1934.

(Oct. 30, 1934, Pittsburgh, Pa.)

Docket No. 9113

(Originally Docketed, Through Error, as No. 9913)

The Youngstown and Suburban Railway Company

v.

The Pennsylvania Railroad Company and Erie Railroad Company

Mr. John J. Fitzpatrick, Assistant General Attorney, The Baltimore and Ohio Railroad Co., Baltimore, Md.

Dear Mr. Fitzpatrick:

This will acknowledge receipt of your letter of the 26th inst., together with copies, in duplicate, of:

1. Manager J. F. Chalfant's Eastern Demurrage and Storage Circular No. 308 dated September 21, 1934.

2. Copy of letter of President W. E. Fowler of the Pittsburgh, Lisbon & Western Railroad Company to Manager Chalfant, dated September 24, 1934.

3. Copy of letter of Manager Chalfant dated September 28, 1934, to President Fowler of the Pittsburgh, Lisbon & Western Railroad Company.

We note that copies have been furnished to all counsel of record.

Very truly yours, The Public Utilities Commission of Ohio, (Signed) C. H. Knisley, Secretary.

JWH/DG.

Copies to August Gutheim, Washington, D. C., Guernsey Orcutt, Pittsburgh, Pa., Leo P. Day, Chicago, Ill., W. T. Pierson, Cleveland, Ohio.

[fol. 301] The Baltimore and Ohio Railroad Company, Baltimore, Maryland

October 26, 1934.

Youngstown Suburban Railway vs. The Pennsylvania Railroad Co.—Ohio 9913

Public Utilities Commission of Ohio, Columbus, Ohio.

Dear Sirs:

In accordance with permission granted at hearing of the above-entitled case at Columbus, I am enclosing herewith in duplicate, copies of—

(Oct. 27, 1934, Pittsburgh, Pa.)

1. Manager J. F. Chalfant's Eastern Demurrage and Storage Bureau Circular No. 308 dated September 21, 1934.

2. Copy of letter of President W. E. Fowler of the Pittsburgh, Lisbon & Western Railroad Company to Manager Chalfant, dated September 24, 1934.

3. Copy of letter of Manager Chalfant dated September 28, 1934, to President Fowler of the Pittsburgh, Lisbon & Western.

A copy of this letter, including copies of enclosures is being forwarded to each party of record.

Very truly yours, John J. Fitzpatrick, Assistant General Attorney.

JJF-h.

Copy: August Gutheim, Attorney, 8 Jackson Place, Washington, D. C., Guernsey Orcutt, Assistant General Counsel, Pennsylvania R. R. Co., Pittsburgh, Pa., Leo P. Day, Commerce Counsel, New York Central Railroad Co., LaSalle Street Station, Chicago, Ill., Willis T. Pierson, Commerce Attorney, Erie Railroad Company, Midland Building, Cleveland, Ohio.

[fol. 302] Eastern Demurrage and Storage Bureau
30 Vesey Street, New York, N. Y.

J. F. Chalfant, Manager. September 21, 1934.

Circular No. 308

To Members:

Recently a number of cases have come to our attention, involving different railroads, of coal being transported from coal mines by barges to river landings where the coal producers have established private track facilities for transferring the coal from barges to freight cars for rail movement, and also, in some cases at least, have established a coal cleaning and sizing tipple.

In all of these cases, the railroads were considering the cars as held for loading, subject to demurrage rules.

In some instances, the contention was set up that the track facilities at the river landings should be considered as coal mine sidings so that cars placed for loading thereon would be exempt from demurrage under the provisions of Demurrage Rule 1, Section B-3.

In all cases where our opinion has been sought, the carriers have agreed with our views—or perhaps we should say we have agreed with their views—that since such tracks are not located at a coal mine which they serve, and since they do not come within the definition of a mine track or mine siding as set forth in Note 1 (a) to Demurrage Rule 1, Section B-3, the carriers would have no tariff authority to exempt empty cars, placed for loading the coal, from

demurrage, and the cars must be considered as being held for loading in accordance with Demurrage Rule 2, Section A-1, the same as cars for loading any commodity other than coal.

We recommend, in the interest of uniformity on the part of our members' roads, that in all such cases, demurrage rules be applied to the cars placed for loading, and 48 hours free time allowed.

Please acknowledge receipt.

Yours very truly, J. F. Chalfant, Manager.

JFC/wn.

[fol. 303] Eastern Demurrage and Storage Bureau

September 28, 1934.

Mr. W. E. Fowler, President, The Pittsburgh, Lisbon & Western R. R. Co., Youngstown, Ohio.

DEAR MR. FOWLER:

Your letter of September 24th acknowledging receipt of our Circular No. 308 of Sept. 21, 1934;

That part of the first paragraph of our Circular 308, which stated that in some cases at least, coal producers have established a coal cleaning and sizing tipple, was not aimed at your particular situation. In fact, I do not seem to have been aware of your situation at Negley, Ohio.

Regarding Note 2 to Demurrage Rule 1, Section B, Paragraph 3, I may state that the Interstate Commerce Commission criticized the use of the word "adjacent" as used in the rule, as being indefinite. I am a member of the A. R. A. Committee on Demurrage and I recall we had great difficulty in attempting to clarify what was meant by "adjacent". The real problem involved was in connection with by-product coke ovens which, as you may know, have sprung up all over the country outside the coal regions. The case before the Commission was in an I. & S. Proceeding where they had suspended the rule published for account of the Missouri Pacific Ry., for the purpose of exempting cars from demurrage, which was intended to exempt cars placed for loading coke at the by-product coke oven of the Lackede Gas Co. at St. Louis, Mo.

It is not our purpose to take issue with your interpretation in connection with the coal washery at Negley, Ohio,

which handles coal coming from barges on the Ohio River, which is moved from the mines to the washing plant over facilities and in equipment owned entirely by the company operating the washing plant—at least, not unless and until the A. R. A. takes cognizance of such situation which would obligate us to again bring it to your attention.

It has also come to our attention that there is one case where a barge line moving coal to the river landing is a common carrier and the railroads were forced into participating in a through rate with the barge line, and as a result the A. R. A. has recently provided a car hire agreement with the barge line. Under such circumstances, the coal is in transit under a through rate and the cars are subject to the car hire agreement in lieu of demurrage.

Yours very truly, J. F. Chalfant, Manager.

JFB/wn.

[fol. 304] The Pittsburgh, Lisbon & Western Railroad Company,

Youngstown, Ohio

September 24, 1934.

Mr. J. F. Chalfant, Manager, Eastern Demurrage and Storage Bureau, 30 Vesey St., New York, N. Y.

Dear Sir:

I have before me your Circular No. 308, issued under date of September 21st, having to do with assessment of demurrage charges against cars placed for loading coal coming from water haulage.

There is in existence on our line a condition covered in the first paragraph of your Circular and, no doubt, the last two lines of this paragraph were aimed at our particular situation. At Negley, O. there is a coal washing and preparation plant which handles coal coming from barges on the Ohio River. This coal has moved from the mines to this washing plant over facilities and in equipment owned entirely by the company which operates the washing plant.

Rule 1, Section B, Paragraph 3 of the demurrage tariff exempts from demurrage charges empty cars placed for loading coal at coal washers when the washers are located at or adjacent to mines producing the coal to be washed, and also exempts such cars under load with coal at coal washers.

Note 2 under this same paragraph reads as follows: "Coal washers and coke ovens shall not be considered as adjacent to coal mines when the coal to be washed or to be used in making coke is moved from the mines to washers or to coke ovens under freight tariff rates."

Our interpretation of this tariff provision is that this coal washing plant at Negley, O. must be considered as adjacent to the mines which produce the coal as the coal has not moved from the mines to the washing plant under freight tariff rates, and we consider the cars placed for loading coal at this particular washing plant are exempt from demurrage charges under the tariff as it now stands.

Very truly yours, (Sgd.) W. E. Fowler, President.

WEF/M.

[fol. 305] PENNSYLVANIA RY. CO. EXHIBIT NO. 5

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

4533. Equity

THE PENNSYLVANIA RAILROAD COMPANY and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY

vs.

THE PITTSBURGH, LISBON & WESTERN RAILROAD COMPANY, Montour Railroad Company, Youngstown & Suburban Railway Company, Clay Products Railway Company, Northern Montour Railroad Company, Pittsburgh Coal Company, Hine-McKinley Company, and Galitzen I. Reilly and Stephen J. Quinn, Partners, Doing Business under the Firm Name of "Reilly & Quinn," J. E. White

[fol. 306] MEMORANDUM OPINION OF COURT ON MOTION FOR PRELIMINARY INJUNCTION—Filed October 2, 1933

WEST, J.:

After considering the voluminous briefs and affidavits submitted on the motion of the plaintiffs for a preliminary injunction, I conclude that such injunction should not issue.

The proof submitted by defendants that the new track from Negley to Smith's Ferry is a purely private enterprise

of the Pittsburgh Coal Co., and will not be devoted to common carriage in any sense, greatly outweighs that of the plaintiffs to the contrary.

As I understand Sec. 1, Pars. (18) to (22), Tit. 49, U. S. C., these provisions have no application to a privately owned track over which a producer owning the same carries his goods to an interstate point for preparation for market. See the Pipe Lines cases, 234 U. S. 548, 561-2.

While the Coal Co. owns all the stock of the Pittsburgh, Lisbon & Western Railroad and practically all that of the Youngstown & Suburban, and because of this and the fact that a majority of the directors of the railroads are either directors, officers, or employes of the Coal Co., the latter may be said to control the carriers, yet it can not be found from the evidence before me that the Lisbon, which is a [fol. 307] public common carrier, is a mere agent or instrumentality of the Coal company. Consequently I find no basis for the holding desired by the plaintiffs that the corporate entities of these defendant companies should be disregarded in order to prevent the loss to the public which the Interstate Commerce Commission evidently felt when it rejected the application of the Lisbon, would result from the extension of that railroad. And further, this privately owned and constructed track is an entirely different enterprise in point of law from the attempted extension of the Lisbon. Being, so far as the court is now advised, lawful and not within the purview of the act, it may not be adjudged unlawful through the application of the rule that corporate entities may be disregarded to prevent abuse of public rights. That rule would probably apply and the trackage, even though constructed by the Coal Co., at its own expense and on its own property, might well be held an extension of the railroad if the track were to be employed in common carriage. For that would be the kind of extension within the purview of the law, and without commission consent it could not properly be made by the Coal Co., the sole stockholder of the Lisbon, any more than by the railroad itself.

There is evidence showing that same deception, or at least sharp practice, was used in securing portions of the right of way, owners of lands being led to understand in a few cases that they were dealing with a railroad company, which to the ordinary man means a public carrier having

the right to condemn property. Arrangements with public authorities for road crossings were in some instances on the same dubious basis; in fact it was said by the Coal Co. on the hearing that the buyer could not be frank in these dealings for fear the Coal Company's plans might be thwarted.

[fol. 308] I have taken this class of evidence into account as well as all the other testimony, in reaching the only conclusion which I think is justified, towit, that the Coal Co. desires and expects to build and operate a purely private track for its own purposes and to meet its own needs. While the plaintiffs strongly suspect that such an arrangement will not continue indefinitely, they are unable to produce any proof on the subject.

The motion for the preliminary injunction is overruled and the restraining order heretofore granted is vacated and set aside. Exceptions to plaintiffs.

S. H. West, Judge.

Oct. 2, 1933.

[fol. 309] DECREE

(Entered January 29, 1934, by S. H. West, Judge)

This day came the parties and their counsel and this cause came on to be heard on the pleadings and evidence and was argued by counsel; and having made and filed its findings of fact and conclusions of law, to which certain written exceptions were taken by the parties,

It is thereupon adjudged and decreed by the court that the bill and supplemental bill of the complainants be and the same are hereby dismissed at their costs, for which exception is awarded. To all of which the complainants except.

S. H. West, Judge.

[fol. 310] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 4533. In Equity

THE PENNSYLVANIA RAILROAD COMPANY and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, Plaintiffs,

vs.

THE PITTSBURGH, LISBON & WESTERN RAILROAD COMPANY, PITTSBURGH COAL COMPANY, ET AL., Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

And now, towit, this 22nd day of January, 1934, the court makes the following findings of fact:

1. Plaintiffs are common carrier railroad corporations, subject to the provisions of the Interstate Commerce Act. Both plaintiffs operate lines of common carrier steam railway extending from the Pittsburgh coal field, in southwestern Pennsylvania, to the City of Youngstown, The Pennsylvania reaching beyond to other points in northeastern Ohio. These lines follow the Monongahela River from the Mining District through the city of Pittsburgh, Pennsylvania, the Ohio River to Beaver, Pennsylvania, and the Beaver and Mahoning Rivers from there to Youngstown, Ohio; and for many years they have been important routes for the transportation of coal from the mines to markets in Ohio and elsewhere.

2. Defendant Pittsburgh Coal Company is a private corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and duly registered and authorized to do business in the State of Ohio, and by its charter is authorized to and is engaged inter alia in the mining of coal the transportation of the same to market and the marketing thereof.

3. Pittsburgh Coal Company owns and for many years past has owned large acreages of coal lands adjacent to and with outlets upon the Monongahela River in the so-called Pittsburgh District of Western Pennsylvania, which lands contain large quantities of recoverable high volatile coal [fol. 311] of excellent grade and quality, and said mines

in such lands known as river mines, are capable of greatly increased production; and other developed mines of said defendants now idle are capable of being put into operation and producing additional large tonnages of coal with outlets upon said river.

4. Pittsburgh Coal Company owns and operates and for many years has owned and operated upon the upper Ohio and Monongahela Rivers, fleets of river barges and tow boats engaged in the river transportation of its said coal, and of sufficient capacity to transport from its said river mines to Smith's Ferry, Pennsylvania, situate on the Ohio River at or near the mouth of the Little Beaver River, and to other river ports, such coal as said river mines do and may produce.

5. Late in 1927, said Coal Company purchased all the capital stock of defendant Pittsburgh, Lisbon & Western Railroad Company (hereinafter called "Lisbon") a common car-ier railroad between New Galilee, Pennsylvania, and Lisbon, Ohio. Shortly after its purchase, a new Board of Directors of the Lisbon was elected, consisting almost entirely of officers and agents of the Coal Company and other subsidiaries. Immediately afterwards the Lisbon applied to the Interstate Commerce Commission for authority to build an extension from Mill Rock to Youngstown, Ohio (28.4 miles) and a second extension from Negley, Ohio, to Smith's Ferry, Pennsylvania (13.3 miles). Pittsburgh Coal Company intervened as an additional applicant and the two plaintiffs here opposed the application. The Coal Company's purpose in purchasing the Lisbon and attempting to extend it was (as it declared before the Commission) to secure transportation of its coal to northeastern Ohio at a cost lower than the rates charged by the trunk lines for similar transportation.

6. On December 16, 1928, the Interstate Commerce Commission entered an order in which it announced its intention to refuse the Lisbon's application, if the plaintiffs should construct and furnish river-rail terminals, that is, facilities [fol. 312] for removing coal from barges on the Ohio river and placing it in railroad cars, for transportation from such terminals to Youngstown and points in Northwestern Ohio. This the plaintiffs did, and on March 16, 1929, the

Lisbon's application was unconditionally refused. (150 I. C. C. 49,619).

7. In January, 1929, the Lisbon purchased approximately 99 percent of the capital stock of defendant Youngstown & Suburban Railway Company, which owned and operated an interurban electric line from Youngstown to Columbiana and Leetonia, Ohio, and which had been unprofitable for some years. The existing directors were replaced by the same officers and agents of the Coal Company who then formed the Board of the Lisbon. On June 7, 1929, the charter of the Youngstown & Suburban was amended to authorize it to construct a branch line from a point on its main line in the town of Columbiana, to a terminus in or near East Liverpool, Ohio. On September 26, 1929, the Lisbon sold its Youngstown & Suburban stock to the Coal Company for the price at which it had purchased such stock. During the years 1929 and 1930, the Youngstown & Suburban built a branch line from Columbiana to a physical connection with the main line of the Lisbon at Signal, Ohio, using funds advanced by the Coal Company, the Lisbon and certain affiliated companies. On May 26, 1931, the Youngstown & Suburban charter was again amended to authorize it to use steam motive power.

8. After the Interstate Commerce Commission refused its application (150 I. C. C. 619), the Lisbon constructed a branch or spur track from its main line at Negley down the valley of Little Beaver Creek for a distance of about one-half mile. In 1931 and 1932 said Coal Company purchased a strip of land between the south end of the Lisbon's said half mile spur and Smith's Ferry, Pa. In one or two cases representations were made to land owners calculated to cause them to believe the land was being acquired by a common carrier railroad. A small portion of this land was procured from the Lisbon.

Upon said strip of land which is owned in fee simple and [fol. 313] has been paid for by said Coal Company, it has constructed at its own sole cost a standard gauge railroad track with one or more tunnels, bridges, etc., of a character similar to main line trackage, and designed to carry a large amount of heavy traffic in standard railroad coal equipment. Said track extends from the coal company's dock and river-rail terminal under construction at Smith's

Ferry, Pa., northwardly to and connects with the south end of said Lisbon switch near Negley, a distance of some thirteen miles. The cost thereof was approximately $1,400,000. This creates a rail connection which in its physical aspects is substantially similar to the extension desired by the Lisbon when it made its application for extension.

9. At Brush Run, some two miles south of Negley and a short distance from the track between Negley and Smith's Ferry and connected therewith by switch tracks, said Coal Company has erected a coal washing plant, for cleaning, sizing and preparing its coal for market. And it contemplates erecting a plant for carbonization of coal at low temperatures and the manufacture of coke and by-products, on lands contiguous to its Brush Run plant, all such lands and connecting tracks being now owned by it in fee.

10. The Coal Company intends to employ on all said trackage between Smith's Ferry and the Lisbon connection only its own locomotives and cars handled by its own employees. And will make or permit no use of said trackage or equipment except for transporting its own coal and products. Said tracks have not been and will not be devoted to or suffered or permitted to be used in any common carrier service whatever or by any common carrier, but with said aforementioned docks and plants, constitute a purely private and privately owned enterprise of defendant Pittsburgh Coal Company and not an extension of said Lisbon railroad. Said trackage is intended to afford said Coal Company cheaper transportation to its markets than can be given by plaintiffs.

[fol. 314] 11. The Coal Company has dominated the affairs of the Lisbon and the Youngstown and Suburban since it became interested in them; it purchased them pursuant to a plan to secure cheaper transportation to the Ohio coal markets, and it has used and improved them as instrumentalities in the furtherance of such a plan. A majority of the directors and of the officers of the Lisbon and the Youngstown and Suburban are officers or directors of the Coal Company also; the officers of the railroad companies generally receive only one salary instead of separate salaries from each company; the same or adjoining offices are used by the three companies (the Lisbon and Youngstown & Suburban paying no rent), the Lisbon and

Youngstown & Suburban have common offices in Youngstown, several of the officers perform their duties for all the companies from the same desks, some being located in space generally devoted to the Coal Company and some in space generally devoted to its affiliated Railroad Companies; all three companies file a joint income tax return; and improvements of the Youngstown & Suburban have been financed by loans from the Coal Company.

12. That none of the common carrier defendants has or has had any direct interest or participation in the said enterprise complained of; that none of said carrier defendants is an agent or instrumentality of, or has been dominated by, the defendant Pittsburgh Coal Company respecting said enterprise; nor is the defendant Pittsburgh Coal Company an agent or instrumentality of, nor has it been dominated by, any of said common carrier defendants respecting the same.

13. When the new tracks is operated at the rate the Coal Company expects to operate it, a substantial amount of traffic will be lost to the plaintiff railroads and diverted to the new track and the lines of the Lisbon and the Youngstown & Suburban.

14. Since the Lisbon's application of 1928 was refused, none of the defendants has applied for or secured any certificate of publi- convenience authorizing new railroad con- [fol. 315] struction in the territory between the *the* Ohio River and Youngstown. The Youngstown & Suburban was extended from Columbiana to Signal without any such certificate.

15. Plaintiffs commenced this suit very shortly after it appeared that the new construction between Negley and Smith Ferry was to be a railroad track, and brought it to final hearing as quickly as circumstances permitted. And the following

Conclusions of Law

1. The plaintiffs are "parties in interest" within the meaning of Section 1 (18) of the Interstate Commerce Act, and have not been guilty of laches.

2. That the defendant Pittsburgh Coal Company has the lawful right, power and authority under its charter and the laws of the state of Ohio and the Commonwealth of Pennsylvania, to construct and operate as a private enterprise,

its private railroad tracks constructed on its own land connecting its unloading dock on the Little Beaver near Smith's Ferry, Pa., with its preparation plant at Brush Run, near Negley, Ohio, as well also as its private tracks connecting its said plant at Brush Run with the spur of the common carrier defendant, Pittsburgh, Lisbon & Western Railroad, near Negley.

3. That the construction and operation of said private railroad tracks by defendant Pittsburgh Coal Company, for its own purposes, is not within the provisions of Section 1, paragraph 18 to 22 of the Interstate Commerce Act requiring a certificate of public convenience and necessity first to be obtained from the Interstate Commerce Commission in certain instances, nor can the before-mentioned private railroad tracks of the defendant Pittsburgh Coal Company be deemed or construed to be an extension of the lines of the common carrier defendant, Pittsburgh, Lisbon & Western Railroad Company, within the meaning of said Act.

[fol. 316] 4. That the construction of said private railroad tracks by the defendant Pittsburgh Coal Company for its own use is not a violation of the order of the Interstate Commerce Commission, of March 16, 1929, denying the certificate of public convenience and necessity prayed for by the Pittsburgh, Lisbon & Western Railroad Company to construct branch lines in the proceedings cited as "Construction of Branches by Pittsburgh, Lisbon & Western Railroad Company", 150 I. C. C. 43; 150 I. C. C. 619.

5. That the privately owned and constructed track of the Pittsburgh Coal Company is an entirely different enterprise in point of law from said proposed extension of Pittsburgh, Lisbon & Western Railroad.

6. That the privately owned and operated track of the defendant Pittsburgh Coal Company is a lawful enterprise and being lawful may not be adjudged unlawful through the application in this case of the rule that corporate entities may be disregarded to prevent abuse of public rights.

7. That there is no equity in the complainants' Bill of Complaint or Supplemental Bill of Complaint, and the same should be dismissed at the costs of the complainants.

(Sgd.) S. H. West, Judge.

January 22, 1934.

[fols. 317-349] Pennsylvania Railway Co. Exhibit No. 6 Omitted. See appendix "A". Printed side page 14, ante.

[fol. 350] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Jan. 3, 1936

To The Honorable the Associate Justice of the Supreme Court of the United States assigned to the Sixth Circuit:

Application for Allowance of an Appeal to Review the Final Decree of the District Court of the United States for the Southern District of Ohio, Eastern Division, Entered in the Above Entitled Cause on the 11th Day of December, 1935

Now come The Pennsylvania Railroad Company; Erie Railroad Company; The Baltimore & Ohio Railroad Company; The Pittsburg & Lake Erie Railroad Company; and pray allowance of an appeal direct to the Supreme Court of the United States to review the final decree of the District Court of the United States for the Southern District of Ohio Eastern Division (a three judge court), passed and entered in the above entitled cause on the 11th day of December, 1935, in the certain proceeding pending before said Court and entitled as above, denying petitioners' prayer and dismissing their Bill of Complaint upon the stated ground that "there was no dealing in, or with respect to, this coal in the course of its transportation from the mine in Pennsylvania, from Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania to Negley, Ohio; that the coal throughout the movement from the mine, from Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania, to Negley, Ohio, re- [fol. 351] mained in the ownership, possession and control of the Pittsburg Coal Company which was also the owner of all the facilities employed in that movement; that there was no transportation of the coal in any original package to Negley; that there was no through and continuous transportation from the mine to Negley, and that there was no com-

merce in the coal in the course of its transportation from the mine to Negley."

That the Pittsburg Coal Company, an intervener below, spent large sums of money for the admitted purpose of establishing under its own control machinery for the transportation to and marketing in Ohio of coal mined within the State of Pennsylvania. That under said arrangement, coal is assembled by river at Smith's Ferry, Pennsylvania, where it is held awaiting sale in Ohio. Upon contract of sale being made, or upon the successful culmination of such negotiations being sufficiently imminent, the coal is moved from Smith's Ferry, Pennsylvania, by facilities owned by the Pittsburg Coal Company to a plant at Brush Run, near Negley, Ohio, likewise owned by the Pittsburg Coal Company, where said coal is washed or screened and loaded into cars on the Pittsburg, Lisbon & Western Railroad, a common carrier steam railroad owned by the Pittsburg Coal Company. The movement from Smith's Ferry, Pennsylvania to and including the loading upon cars of the Pittsburg, Lisbon & Western Railroad, is a continuous movement and for the sole purpose of delivering said coal in Ohio. Said coal is then billed via the Pittsburg Lisbon & Western and the Youngstown & Suburban Railway Company (an electric suburban railway company owned by the Pittsburg Coal Company) to Youngstown, Ohio, where it is delivered to consignees.

That effective on or about April 10, 1935, the Public Utilities Commission of the State of Ohio required these applicants operating in the State of Ohio to accept, transfer, switch and deliver coal so moved into the City of Youngstown, Ohio, at the switching rate or charges applicable upon Ohio intrastate traffic, which charges are substantially less than the charges applicable for switching service upon interstate traffic in the City of Youngstown, Ohio.

[fol. 352] That, thereafter, your petitioners filed in the United States District Court for the Southern District of Ohio, Eastern Division, their petition to enjoin said order of the Public Utilities Commission of Ohio requiring the switching of interstate traffic upon intrastate switching rates at Youngstown, Ohio. Said petition was filed on or about April 15, 1935, and docketed as No. 1132 on the Equity Docket of said District Court.

Upon the suggestion of said Court, the Public Utilities Commission of Ohio extended the effective date of its aforesaid order from time to time until now order becomes effective January 2, 1936.

Said cause came on for trial on September 23, 1935, before their Honors, Florence E. Allen, Circuit Judge, and Robert R. Nevin and Benson W. Hough, District Judges, and on December 11, 1935, the District Court as so constituted rendered its opinion dismissing the Bills of Complaint of your petitioners for want of equity and entered its final decree dismissing the said bills for want of equity at the cost of petitioners. The said decree recites by postscript the death of Honorable Benson W. Hough, one of the members of said Court, on November 19, 1935, so that the statutory court as originally convened and to which this proceeding was submitted, does not now exist and cannot, under the statute, grant an application for an order staying the said order of the Public Utilities Commission of Ohio and preserving the status quo and the convenience of the parties until the lodgement of an appeal with your Honorable Court, and the time intervening before the now effective date of said order is insufficient for another such court to be convened and rehear the issues.

Wherefore, your petitioners being aggrieved respectfully pray allowance of an appeal from said final decree of said District Court and for such other and further relief as to [fol. 353] your Honors may seem meet and proper.

(Signed) Frederick D. McKenney, Guernsey Orcutt, for The Pennsylvania Railroad Company. Willis T. Pierson, for Erie Railroad Company. Leo P. Day, for The Pittsburgh & Lake Erie Railroad Company. John J. Fitzpatrick, for The Baltimore & Ohio Railroad Company.

ORDER ALLOWING APPEAL

Appeal allowed.

Bond for $500.00 to be approved by Clerk U. S. Supreme Court.

(Signed) J. C. McReynolds, Justice.

Dec. 31, 1935.

Applicant points to and relies on the provisions of Title 28, Par. 380 U. S. C. A.; Par. 266 Judicial Code as amended in support of jurisdiction of the Supreme Court of the United States to consider and act upon such appeal.

(Signed) T. D. McKinney, Guernsey Orcutt, Attorneys for The Penna. R. R. Co.

[fol. 354] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Jan. 3, 1936

Now come The Pennsylvania Railroad Company; Erie Railroad Company; The Baltimore and Ohio Railroad Company, and The Pittsburgh and Lake Erie Railroad Company, above named, by their respective counsel, and in connection with their petition for allowance of appeal file the following assignments of error upon which they will rely in argument on their appeal to the Supreme Court of the United States from the final order of the specially constituted three-judge District Court of the United States [fol. 355] for the Southern District of Ohio, Eastern Division, on the 11th day of December, 1935:

1. In finding and declaring that there was substantial evidence supporting the finding of The Public Utilities Commission of Ohio that there was no dealing in or with respect to the coals involved in the course of their transportation from the mine in Pennsylvania, from Risher, in Pennsylvania, or from Smith's Ferry, in Pennsylvania, to Negley, in Ohio; that there was no through and continuous transportation from the mine (in Pennsylvania) to Negley (in Ohio); and that there was no commerce in the coal in the course of its transportation from mine to Negley.

2. In finding and deciding that the order of The Public Utilities Commission of Ohio, complained of "is lawful and proper" and therefore the prayer of complainants' bill of complaint should be denied.

3. In decreeing that complainants' said bill of complaint should be dismissed at complainants' costs.

4. In not finding and deciding that coupled with the admitted purpose and continuing intent on part of the shipper to market in Ohio coals mined in and transported from Pennsylvania, said coals while in course of such transportation and pending delivery at ultimate destination were in and of Interstate as opposed to Intrastate Commerce.

5. In not finding and deciding that coals being transported from Pennsylvania for sale, delivery or other commercial disposition in Ohio while in course of transportation and prior to final delivery at ultimate destination were [fols. 356 & 357] not only being moved in interstate commerce but had become articles of interstate commerce.

6. In not finding that the continuing purpose and intent to make sale or otherwise commercially dispose of coals being shipped from one state to another constituted such coals interstate and not intrastate commerce, irrespective of the ownership, whether private or common carrier, of the vehicles in which shipment or transportation movement was being made.

7. In not finding and deciding that the order of the Public Utilities Commission of Ohio, in so far as it required these appellants "in the future to accept, transfer, switch and deliver any other carloads of bituminous coal, shipped from Negley, Ohio, and road-hauled into Youngstown by the Youngstown and Suburban Railway for delivery to consignees, with private sidings, on the Erie Railroad in the City of Youngstown under like circumstances and conditions with respect to the four carloads of bituminous coal herein directly involved, at the Ohio intrastate switching rates or charges applicable to such switching service in Youngstown and contemporaneously in effect", was unlawful in that it is arbitrary, vague, uncertain and dependent for enforcement upon illy defined standards for comparison of future traffic with traffic which will have already moved and become non-existent.

(Signed) Frederic D. McKenney, Guernsey Orcutt, for The Pennsylvania Railroad Company. Willis T. Pierson, for Erie Railroad Company. Leo P. Day, for The Pittsburgh and Lake Erie Railroad Company. John J. Fitzpatrick, for The Baltimore and Ohio Railroad Co.

[fol. 358] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR MAINTENANCE OF STATUS QUO—Filed Jan. 3, 1936

Now come appellants above named and representing that the order of the Public Utilities Commission of Ohio complained of in above-entitled proceedings unless stayed, will become effective on January 2d, 1936; that by reason of the circumstances disclosed in the order of the specially constituted District Court of the United States for the Southern District of Ohio, Eastern Division, there is no existing and duly constituted court available to which an application for the maintenance of the existing status quo may be submitted for consideration and action, it is respectfully prayed—

[fol. 359] That the effective date of the Order entered at a general session of The Public Utilities Commission of Ohio, on the 26th day of March, A. D., 1935, in the certain proceeding No. 9113 and entitled: The Youngstown and Suburban Railway Company v. The Pennsylvania Railroad Company and Erie Railway Company, be further stayed until the final disposition of the appeal this day allowed in the cause wherein The Pennsylvania Railroad Company and others are Appellants and The Public Utilities Commission of Ohio, and John W. Bricker, Attorney General of the State of Ohio, are Appellees.

Respectfully submitted, Frederic D. McKenney, Guernsey Orcutt, Attorneys for Appellants.

Dec. 31, 1935.

[fol. 360] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER STAYING EFFECTIVE DATE OF ORDER OF THE PUBLIC UTILITIES COMMISSION OF OHIO AND MAINTAINING STATUS QUO—Filed Jan. 2, 1936.

On consideration of the motion to postpone the effective date of the order of The Public Utilities Commission of

Ohio, entered on the 26th day of March, 1935, in the matter of The Youngstown and Suburban Railway Company vs. The Pennsylvania Railroad Company and Erie Railroad Company, No. 9113, and for maintenance of the status quo—

It is, this 31st day of December, A. D., 1935, Ordered that the effective date of said order of March 26th, 1935, be postponed and the existing status quo be maintained until the Supreme Court of the United States shall have finally disposed of the matter of the appeal to said Supreme Court [fol. 361] this day granted from the final decree of the District Court of the United States for the Southern District of Ohio, Eastern Division, entered on the 11th day of December, 1935, in the cause wherein the Pennsylvania Railroad Company and Erie Railroad Company are complainants and The Public Utilities Commission of Ohio, and John W. Bricker, Attorney General of the State of Ohio, are defendants. Bond for $5,000.00 acceptable to Clerk U. S. Supreme Court to be given to indemnify appellees against loss.

(Sgd.) J. C. McReynolds, Associate Justice.

Dec. 31", 1935.

A true copy. Test: (Sgd.)
Charles Elmore Cropley, Clerk, Supreme Court, U. S.

[fols. 362-364] Bond on stay for $5,000, approved and filed Jan. 2, 1936, omitted in printing.

[fol. 365] Cost bond on appeal for $500.00, approved and filed Jan. 3, 1936, omitted in printing.

Citation, in usual form, showing service on Don Rose et al., filed Jan. 6, 1936, omitted in printing.

[fol. 366] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE—Filed Jan. 6, 1936

Now comes, Guernsey Orcutt, and having first been duly sworn on oath, deposes and says that he has this day served

upon Messrs. Don Rose and Rose & Eichenauer, personally known to him to be counsel for the Pittsburgh Coal Company in a certain proceeding before the United States District Court, Southern District of Ohio, Eastern Division, being Equity No. 1132, copies of the following papers in the appeal of The Pennsylvania Railroad Company, et al. vs. The Public Utilities Commission of Ohio, et al., to the Supreme Court of the United States from the decision of the United States District Court in the cause first above mentioned.

1. Citation directed to the Public Utilities Commission of Ohio, John W. Bricker, Attorney General of the State of Ohio, and Pittsburgh Coal Company to appear in the Supreme Court of the United States within forty (40) days from December 31, 1935.

2. Application for Allowance of Appeal.

3. Assignment of Errors.

4. Separate Statement as to Jurisdiction.

5. Notice Pursuant to Rule 12, Paragraph 2, Rules of the Supreme Court of the United States.

6. Petition for Maintenance of Status Quo.

7. Order Staying Effective Date of Order of Public Utilities Commission of Ohio and Maintaining Status Quo.

8. Bond in the amount of $5,000.00.

(Signed) Guernsey Orcutt.

On this fourth day of January, A. D. 1936, personally appeared before me the subscriber, Guernsey Orcutt, and makes oath that he delivered true copies of all said papers to Messrs. Roy Rose and Rose & Eichenauer.

Sworn to and subscribed the 4th day of January, A. D. 1936. (Signed) LeVan R. Geiger, Notary Public. My subscription expires —— —, ——. My commission expires April 1, 1939. (Seal.)

[fol. 367] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE—Filed Jan. 6, 1936

STATE OF OHIO,
Franklin County, ss:

Sherman B. Randall, being first duly sworn, deposes and says that he is one of the attorneys of and for the appellants in the proceedings hereinafter described; and that he has this 6th day of January, 1936, served upon John W. Bricker, as Attorney General of the State of Ohio, personally, and upon Don C. Power known to the affiant to be counsel for the Public Utilities Commission of Ohio in the certain proceedings before the United States District Court, Southern District of Ohio, Eastern Division, being Equity No. 1132, copies of the following papers in the appeal of the Pennsylvania Railroad Company, et al, to the Supreme Court of the United States from the decision of the United States District Court in the cause first above mentioned:

1. Citation directed to the Public Utilities Commission of Ohio, John W. Bricker, Attorney General of the State of Ohio, and Pittsburgh Coal Company to appear in the Supreme Court of the United States within forty (40) days from December 31, 1935.

2. Application for Allowance of Appeal.

3. Assignment of Errors.

4. Separate Statement as to Jurisdiction.

5. Notice pursuant to Rule 12 Paragraph 2, Rules of the Supreme Court of the United States.

6. Petition for maintenance of Status Quo.

7. Order staying effective Date of Order of Public Utilities Commission of Ohio and Maintaining Status Quo.

8. Bond in amount of $5,000.00.

(Signed) Sherman B. Randall.

Sworn to and subscribed by Sherman B. Randall before the undersigned, this 6th day of January, 1936. (Signed) Lucille S. Black, Notary Public, Franklin County, Ohio.

[fol. 368] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed Jan. 23, 1936

To the Clerk:

Please prepare, certify and transmit to the Clerk of the Supreme Court of the United States record on appeal in the above entitled case, including the following:

1. Petition to enjoin, etc. order of the Public Utilities Commission of Ohio, filed by the Pennsylvania Railroad Company, et al., plaintiffs.
2. Præcipe.
3. Subpœna as executed.
4. Answers of Defendants.
5. Application and Motion for interlocutory injunction.
6. Notice of hearing filed May 11, 1935.
7. Intervening Petition of the Baltimore & Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburgh & Lake Erie Railroad Company and The New York Central Railroad Company for leave *in* intervene in behalf of petitioners, and order granting such leave.
8. Petition of Pittsburgh Coal Company for leave to intervene as party defendant, and order granting such leave.
9. Affidavit of A. S. Jennings.
10. Affidavit of J. A. Ferguson.
11. Decision, findings and Final Decree of Judges Allen and Nevin entered December 11, 1935, denying prayer of complainants' bill and dismissing the bill at cost of complainants.
12. Exhibit No. 1 being a copy of the complaint filed before the Public Utilities Commission of Ohio in its Docket No. 9113.

[fol. 369] 13. Exhibit No. 2 being transcript of proceedings and testimony before the Public Utilities Commission of Ohio in Docket No. 9113 taken on October 17th and 18th, 1934.

14. Exhibit No. 3 being a complete set of the exhibits offered in evidence before the Public Utilities Commission of Ohio, in Docket No. 9113.

15. Exhibit No. 4 being Circular No. 308 of the Eastern Demurrage and Storage Bureau dated September 21, 1934; letter of J. F. Chalfant, Manager, to W. E. Fowler, President of the Pittsburgh, Lisbon & Western Railroad Company, dated September 28, 1934; letter of W. E. Fowler, President of the Pittsburgh, Lisbon & Western Railroad Company, to J. F. Chalfant, dated September 24, 1934, together with letter of transmittal of said copies to the Public Utilities Commission of Ohio and acknowledgment of receipt thereof.

16. Exhibit No. 5 being memorandum opinion, decree and findings of fact and conclusions of law in the District Court of the United States for the Northern District of Ohio, Eastern Division No. 4533—in Equity, being the case of The Pennsylvania Railroad Company et al. vs. The Pittsburgh, Lisbon & Western Railroad Company, et al.

17. Exhibit No. 6 being report and order of the Public Utilities Commission of Ohio in its docket No. 9113, issued March 26, 1935.

18. Application for allowance of appeal by The Pennsylvania Railroad Company, Erie Railroad Company, The Baltimore & Ohio Railroad Company and The Pittsburgh & Lake Erie Railroad Company, and endorsement allowing appeal and fixing bond.

19. Assignments of Error.

20. Statement by plaintiffs of the jurisdiction of the Supreme Court of the United States to review upon direct appeal.

21. Statement directing attention to the provisions of Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States and acknowledgment of service thereof.

[fol. 370] 22. Petition for maintenance of status quo.

23. Order staying effective date of order of the Public Utilities Commission of Ohio maintaining status quo and fixing bond.

24. Bond.

25. Citation and proof of service.

26. Proof of service upon defendants of application for allowance of appeal, assignments of error, separate state-

ment as to jurisdiction, petition for maintenance of status quo, and bond.

Frederic D. McKenney, Guernsey Orcutt, for the Pennsylvania Railroad Company. Willis T. Pierson, for Erie Railroad Company. Leo P. Day, for The Pittsburgh & Lake Erie Railroad Company. John J. Fitzpatrick, for The Baltimore & Ohio Railroad Company.

Appellees, by their counsel, consent to the preparation and transmittal of the record in accordance with the foregoing Præcipe.

Donald C. Power, for the Public Utilities Commission of Ohio. John W. Bricker, Attorney General of the State of Ohio. Don Rose, for the Pittsburgh Coal Company, Interveners.

[fols. 371 & 372] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 373] In Supreme Court of the United States

Statement of Points Relied Upon and Designation of Parts of the Record Necessary for Consideration Thereof—Filed Feb. 13, 1936

To Charles Elmore Cropley, Esquire, Clerk, Supreme Court of the United States.

Sir:

Pursuant to the mandatory provisions of paragraph 9 of Rule 13 of the Revised Rules of the Supreme Court of the United States, the appellants above named file this [fol. 374] designation of points upon which they will rely in arguing above appeal and also of the parts of the transcript of the record regarded as necessary for a full consideration thereof:

Points

1. The transportation of the commodity, to-wit, bituminous coals, from origins in Pennsylvania to market or

consumer destinations in Ohio constituted movement in interstate as opposed to intrastate commerce and carrier rates for road hauls or services, terminal or otherwise, were controlled by applicable interstate tariffs on file with the Interstate Commerce Commission. In such circumstances The Public Utilities Commission of Ohio was without jurisdiction and its order of March 26th, 1935, since upheld by the order of the United States District Court for the Southern District of Ohio, Eastern Division, under review, was a nullity and void;

2. There was no sufficient evidence of substantial import introduced before The Public Utilities Commission of Ohio to sustain its findings to effect that there were no dealings in or with respect to said bituminous coals in course of its transportation from the mine in Pennsylvania, or Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania, to Negley Ohio; or that said coals throughout their movement from Smith's Ferry, Pennsylvania, to Youngstown in Ohio, were not in through and continuous transportation in commerce;

3. The admitted purpose and continuing intent on the part of the shipper to market in Ohio coals mined in and transported from points of origin in Pennsylvania constituted said coals while in course of such transportation and pending delivery at ultimate destination, objects of inter- [fol. 375] state as opposed to intrastate commerce, such coals having been transported from Pennsylvania points for purposes of sale or other commercial disposition in Ohio;

4. The continuing purpose and intent on part of the shipper and owner to sell or otherwise commercially dispose of coals shipped from one State to destination points in another State constituted such coals articles of interstate and not intrastate commerce, irrespective of whether the vessels or vehicles in which such shipment or transportation was effected were held in private or common carrier ownership.

5. The Public Utilities Commission of Ohio was and is without authority in law to require appellants "in the future to accept, transfer, switch and deliver * * * other carloads of bituminous coal, *w*hipped from Negley, Ohio,

and roadhauled into Youngstown by the Youngstown and Suburban Railway for delivery to consignees with private sidings, on the Erie Railroad in the city of Youngstown under like circumstances and conditions with respect to the four car-loads of bituminous coal herein (in this case) directly involved, at the Ohio intrastate switching rates or charges applicable to such switching service in Youngstown and contemporaneously in effect," because such order is so arbitrary, so vague and uncertain and so dependent for enforcement upon insufficiently defined standards of comparison between traffic which has moved and become nonexistent and traffic which may move in the future, as to render enforcement thereof or compliance therewith unreasonable if not entirely impossible;

6. The shipments here in question were actually treated by carriers controlled by the shipper as in interstate commerce.

[fol. 376] Designation of Portions of Record Necessary for Consideration of Above Points

Please print the entire record.

Yours very truly, Guernsey Orcutt, Frederic D. McKenny, Attorneys for Appellants.

[fol. 377] [File endorsement omitted.]

Endorsed on cover: File No. 40,300. S. Ohio, D. C. U. S. Term No. 746. The Pennsylvania Railroad Company, Erie Railroad Company, The Baltimore and Ohio Railroad Company, and The Pittsburgh and Lake Erie Railroad Company, appellants, vs. The Public Utilities Commission of Ohio, John W. Bricker, Attorney General of the State of Ohio, and Pittsburgh Coal Company. Filed February 6, 1936. Term No. 746, O. T., 1935.

FILE COPY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 746

THE PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, AND THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, ATTORNEY GENERAL OF THE STATE OF OHIO, AND PITTSBURGH COAL COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

STATEMENT AS TO JURISDICTION.

FREDERIC D. MCKENNEY,
GUERNSEY ORCUTT,
WILLIS T. PIERSON,
LEO P. DAY,
JOHN J. FITZPATRICK,
Counsel for Appellants.

INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Nature of the case and rulings below	1
Date of the judgment sought to be reviewed and date of application for appeal	3

STATUTES CITED.

Act of Congress of June 18, 1910, c. 309, Sec. 17, 36 Stat. 557	3
Act of Congress of March 3, 1911, c. 231, Sec. 226, 36 Stat. 1162	3
Act of Congress of March 4, 1913, c. 160, 37 Stat. 1013	3
Act of Congress of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Sec. 266 Judicial Code, as amended	3
Constitution of the United States, Article 1, Sec. 8, Par. 3	2
Article XIV, Sec 1	2
Interstate Commerce Act	4
United States Code, Title 28, Section 380	2, 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 746

THE PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY, AND THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, ATTORNEY GENERAL OF THE STATE OF OHIO, AND PITTSBURGH COAL COMPANY,

Appellees.

SEPARATE STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States appellants here submit their separate typewritten statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon Appeal to review the decree of the United States District Court for the Southern District of Ohio, Eastern Division, which holds the Order of The Public Utilities Commission of Ohio entered on the 26th day of March, 1935, in a certain proceeding entitled *The Youngstown and Suburban Railway Com-*

pany v. *The Pennsylvania Railroad Company and Erie Railroad Company*, No. 9113, to be lawful and proper:

The instant suit was brought in said District Court of the United States for the Southern District of Ohio, Eastern Division, by said The Pennsylvania Railroad Company and Erie Railroad Company against The Public Utilities Commission of Ohio and John W. Bricker, Attorney General of said State, to enjoin, set aside and annul said above identified order of said Commission as constituting an undue and direct burden on and in undue interference with interstate commerce, in violation of Paragraph 3, Section 8, of Article I, of the Constitution of the United States and as contrary to applicable provisions of the Act of The Congress of the United States known as the Act to Regulate Commerce (as Amended; also because of its impingements upon the rights of the complainants in that its enforcement would necessarily result in depriving said complainants of their property without due process and otherwise deny to them the equal protection of law, contrary to the prohibitions of Section 1, Article XIV, of the Constitution of the United States; and, further, that said order so complained of, had been issued without authority of any applicable law, and was arbitrary in that it was designed to compel performance by complainants of certain services in connection with movements of interstate traffic under rules, regulations and rates prescribed by said The Public Utilities Commission of Ohio, applicable to intrastate commerce in said State of Ohio;

That complainants' application in such connection was duly presented to the United States District Judge for said Southern District of Ohio, Eastern Division, who called to his assistance to hear and determine said application two other Judges, viz., Allen and Nevin as so required to do by provisions of Section 380 of Title 28, United States Code, and said United States District Court so con-

stituted as a statutory or three-judge court, heard argument and passed its decree denying the prayers of the complainants' bill of complaint and dismissing same at complainants' cost, said decree being now complained of and sought to be brought under review and reversed by petition for appeal herewith presented:

Acts of June 18, 1910, c. 309, Sec. 17, 36 Stat. 557; March 3, 1911, c. 231, Sec. 226, 36 Stat. 1162; March 4, 1913, c. 160, 37 Stat. 1013; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Sec. 266 Judicial Code, as Amended.

1. By express provisions of said Sec. 380 of Title 28, U. S. Code, statutory jurisdiction is conferred upon this Court to review by direct appeal the judgments, including the judgment in the instant case, of such specially constituted District Court.

2. The Judgment complained of and to be reviewed was passed and entered March 11th, 1935.

3. Application for allowance of Appeal was presented to Mr. Justice James Clark McReynolds, Associate Justice assigned to the Sixth Judicial Circuit on December 31, 1935, and allowed the same date.

4. The order of The Public Utilities Commission of Ohio in terms required complaining carriers by steam railroad according as they participate in the transportation to cease and desist from omitting, neglecting or refusing without unreasonable delay to transfer, switch and deliver to named consignees of the traffic in Youngstown, certain indicated car loads of bituminous coal and other carloads of such coal in the future at the Ohio intrastate rates or charges applicable for the switching of such traffic in Youngstown and contemporaneously in effect, which coals had been or

hereafter might be delivered at Negley, Ohio, and road-hauled into Youngstown by the Youngstown and Suburban Railroad for such or similar delivery to consignees, it having been and still being contended by complainants, appellants here, that in the circumstance fully disclosed by the record of the proceedings had in the cause, the traffic in question was and is in truth and fact interstate traffic, which properly took and properly should be transferred, switched and delivered on the payment of legal rates prescribed in tariffs duly published and on file with the Interstate Commerce Commission, by which said interstate tariff rates these complainants and intervenors, appellants here, are severally and individually bound.

5. The judgment of the District Court complained of and to be reviewed on this appeal improperly and ill-advisedly upheld such order of the Public Utilities Commission of Ohio, contrary to the provisions of the Act to Regulate Commerce, as Amended, as same in principle has been construed and applied by this honorable Court in many decided cases, no one of which factually is "on all fours" with the instant case.

Respectfully submitted,

(Signed) FREDERIC D. MCKENNEY,
GUERNSEY ORCUTT,
For the Pennsylvania Railroad Co.
WILLIS T. PIERSON,
For Erie Railroad Company.
LEO. P. DAY,
For the Pittsburgh & Lake Erie Railroad Company.
JOHN J. FITZPATRICK,
For the Baltimore and Ohio Railroad Company.

(7413-C)

INDEX.

SUBJECT INDEX.

	Page
Statutory authority for the appeal	1
Decree below not questioned on account of death of one of the Judges	2
Opinion-decree below unaccompanied by findings of fact as required by Equity Rule 70½	2
Decree below quoted in full	3
"Probable jurisdiction" found	4
Points relied upon in support of appeal and for reversal	4
(1) Ohio Commission's order void because movement affected was interstate	4
(2) Evidence before Ohio Commission does not sustain intrastate character of the movement	5
(3) Continuing purpose to market coals in Ohio gave movement its interstate status	5
(4) Intent and not the means if transportation rendered the movement interstate	5
(5) Carriers controlled by the shipper treated the movement as interstate	5
The movement here involved was unquestionably subject to the Federal Interstate Commerce Act	6
The carriers concerned	7
The Pennsylvania R. R. Co., et al., appellants	7
The Pittsburgh, Lisbon & Western R. Co.	8
The Youngstown & Suburban R. Co.	8
The Pittsburgh Coal Company	8
Intercorporate relations of—Pittsburgh Coal Co., Pittsburgh, Lisbon & Western R. Co. and Youngstown & Suburban R. Co., and its bearing on instant case	9
The Lisbon's application to I. C. C., for certificate to construct branch lines	11
Interstate Commerce Commission's disposal of such application	11
Branch from Columbiana to Signal constructed by the Y. & S.	17
Lisbon's construction at Negley-Brush Run	17
Pittsburgh Coal Company's connection between Smith's Ferry, Pa., and the Lisbon's spur at Brush Run, Ohio	17
The rates involved	19
Billing on Ohio intrastate rate	20
Appellants' refusal to accept except on payment of interstate tariff rates	21
Proceedings before the Ohio Public Utilities Com'n	21

Page

Appellants bill of complaint in U. S. District Court to enjoin "cease and desist" order of Ohio Commission 27
Bill dismissed by District Court 23
Appeal allowed by this Court January 3, 1936 23
Facts 23
Coal Company's evident intent to evade the denial by I. C. C. of Lisbon's proposed trackage extensions, &c. 24
Map showing locus of proposed and existing trackage 24
The Coal Company's connecting trackage 24
The movement of the shipments here in question 25
The refusal of appellants to accept at Youngstown 27
The controlling question is essential character of the movement 28
The abiding purpose of the Coal Company to sell Pennsylvania coal in Ohio 29
Ohio orders therefore booked while it was en route 30
Argument 31
Applicable definition of "Commerce" 31
What is inter and what is intra-state Commerce 32
The Coal Company's purpose and actions to circumvent interstate status 32
Citation of cases 33
Effect of part-way transportation on shipper's own vehicles 36
Ruling and facts in the Southern Pacific Terminal case 38
Ruling and facts in Ohio Commission v. Worthington, on "Lake-Cargo coal" 43
Through transportation cannot be camouflaged by separating it into component parts, (Baer Bros. v. Denver &c. Ry) 47
Cases cited showing impotency of local or State laws as to where interstate commerce is involved 49
The Lisbon's treatment of demurrage charges by the movements in question constituted recognition by it of the interstate character of the movement 51
The District Court's evident misapprehension as to applicability of decisions of this Court 52
Differentiation of cases relied on by the District Coourt 54

CASES CITED.

Adair v. United States, 208 U. S. 161 34
Atlantic Coast Line v. Standard Oil Co., 275 U. S. 257 ..... 52, 54
Baer Bros. v. Denver & R. G. R. Co., 233 U. S. 479 ..... 47, 56
Baltimore & Ohio S. W. R. Co. v. Settle, 260 U. S. 166 ..... 35, 57
Bituminous Coal to Youngstown, 163 I. C. C. 3 ....
Champlain Realty Co. v. Brattleboro, 260 U. S. 366 48
Chicago, M. & St. P. Ry. Co. v. Iowa 56
Cincinnati, N. O. & Tex. Pac. Ry. v. Interstate Commerce Commission, 162 U. S. 184 43
Coe v. Erroll, 116 U. S. 517 35

Page

Construction of Branches by Pittsburgh, Lisbon & Western R. R. Co., 150 U. S. 43 ..... 11, 13
Covington Ry. Co. v. Covington, 235 U. S. 537 36
Edwards v. Holland Banking Co., 75 F. (2d) 713 2
Erie R. R. Co. v. United States, 280 U. S. 98 59
Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52 35
Heyman v. Hayes, 236 U. S. 178 35
Kirkmeyer v. Kansas, 236 U. S. 568 49
Louisiana R. R. Com'n v. Texas & Pac. Ry., 229 U. S. 336 36
Louisville & Nashville R. Co. v. United States, 10 Fed. Supp. 185 2
McCall v. California, 136 U. S. 104 33
Ohio R. R. Comn. v. Worthington 36, 43, 44
Pennsylvania R. R. Co. v. Clark, 238 U. S. 456 36
Pipe Line Cases, 234 U. S. 548 ..... 52, 53
Public Utilities Com'n v. Landon, 239 U. S. 236 34
Railroad Commission of Louisiana v. Texas & Pacific Ry. Co. 56
Railroad Com'n of Ohio v. Worthington, 225 U. S. 101 59
Santa Fe, &c. Ry. v. Grant Bros., 228 U. S. 177 52
Southern Pacific Term'l Co. v. Interstate Commerce Com'n and Young, 219 U. S. 498 ..... 36, 38, 44, 45
Southwestern Bell. Tel. Co. v. City of San Antonio, 75 Fed. (2d) 881 2
(Certiorari denied, 295 U. S. 754) 2
Sparks, U. S. Attorney, v. Melwood, 74 F. (2d) 695 3
State v. Engle, 34 N. J. L. 425 48
Swift & Co. v. United States, 196 U. S. 375 34
Texas & New Orleans R. Co. v. Sabine Tram Co., 227 U. S. 111 ..... 34, 49, 56
United States v. Erie R. R. Co., 280 U. S. 98 ..... 36, 46

STATUTES.

Interstate Commerce Act (U. S. Code, Tit. 49) 6
Title 28, U. S. Code, Sec. 380 1
Fed'l Equity Rule 70½, Tit. 28, U. S. C., Sec. 723 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 746

THE PENNSYLVANIA RAILROAD COMPANY; ERIE RAILROAD COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY AND THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, ATTORNEY GENERAL OF THE STATE OF OHIO, AND PITTSBURGH COAL COMPANY.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANTS.

The case is before this Court on direct appeal (Title 28 U. S. Code, Sec. 380) to review a judgment of the District Court of the United States for the Southern District of Ohio, specially constituted and consisting of the honorable Florence E. Allen, Circuit Judge; Robert R. Nevin, District Judge; and Benson W. Hough, District Judge. As appears

from a note at foot of the decree, District Judge Hough, who sat on the hearing of the cause and participated in the conference at which the case was decided, had died November the 19th, 1935, before said decree was signed on December 11, 1936, (R. 69, 70).

No objection or question as to the validity or propriety of the entry of the decree appealed from is made or raised on score of Judge Hough's inability to participate in the formalities usually attending the entry of a three-judge court decree.

OPINIONS.

The opinion which also constitutes the decree of the District Court has not been officially printed, but may be found in the printed transcript of the record at pages 69 and 70. It is not accompanied by any findings of facts, special or otherwise, nor by separately stated conclusions of law thereon as required by Amended Equity Rule 70½:

See:

Southwestern Bell Tel. Co. v. *City of San Antonio*, 75 F. (2d) 880, 881; certiorari denied, *San Antonio* v. *Southwestern Bell Tel. Co.*, 295 U. S. 754;

Edwards v. *Holland Banking Co.*, 75 F. (2d) 713, 715;

Louisville & Nashville R. Co. v. *United States*, 10 Fed. Supp. 185, 189, wherein as indicative of the scope and application of Equity Rule 70½, it is said:

> "There is little need for findings of fact in this suit for there was no evidence offered by either side. The pleadings, together with an affidavit by defendant and certain exhibits attached to the complaint, constitute the sole basis of our findings. We view Supreme Court Equity Rule 70½ (28 U. S. C. A. Sec. 723), however, as imperative, and we accompany this memorandum with findings of fact and conclusions of

law in the hope that they will clarify and shorten the statement of issues in case of an appeal."

Compare also:

Sparks, U. S. Attorney, v. *Mellwood,* 74 F. (2d) 695.

The combined opinion and decree of the District Court below is short and in its entirety reads, (R. 69-70) as follows:

"Decree—Filed Dec. 11, 1935

"This cause came on to be heard on the pleadings, the record and the argument of counsel. The court, upon consideration thereof, is of the opinion that there is substantial evidence supporting the finding of the Public Utilities Commission of Ohio that there was no dealing in, or with respect to, this coal in the course of its transportation from the mine in Pennsylvania, from Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania, to Negley, Ohio; that the coal throughout the movement from the mines, from Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania, to Negley, Ohio, remained in the ownership, possession and control of the Pittsburgh Coal Company which was also the owner of all the facilities employed in that movement; that there was no transportation of the coal in any original package to Negley, that there was no through and continuous transportation from the mine to Negley, and that there was no commerce in the coal in the course of its transportation from the mine to Negley.

"The order complained of in the bill, since the interstate transportation covered by the record was carried on wholly by private carrier, and since the transportation by common carrier was wholly within the State of Ohio, is lawful and proper (Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Construction Co., 228 U. S. 177; The Pipe Line Cases, 234 U. S. 548, 562; Atlantic Coast Line Ry. Co. v. Standard Oil Co. of Kentucky, 275 U. S. 257), and the prayer of complainants' bill should be denied.

"It is therefore, by the court ordered, adjudged and decreed that the prayer of complainants in their bill contained be and it is hereby denied and complainants' bill is hereby dismissed at complainants' costs. Exceptions to the ruling and order of the court are allowed to complainants and intervenors."

The Report and Order of the Public Utilities Commission of Ohio are set forth in entirety at pages 8 to 42, both included of the transcript of the record, being marked "Appendix A to Petition" (See R. 8, *et seq*).

JURISDICTION.

Paragraph 1 of Rule 12 has been complied with and "Probable jurisdiction has been found" by the Court—see Journal entry of March 2, 1936.

POINTS RELIED UPON IN SUPPORT OF APPEAL AND FOR REVERSAL.

1.

The transportation of the commodity, to-wit, bituminous coals, from mines of origin in Pennsylvania to market or consumer destinations in Ohio constituted both transportation and commerce in interstate as opposed to intrastate commerce, and rates and charges for road hauls and services, terminal or otherwise, provided by common carriers participating therein were controlled by applicable interstate tariffs on file with the Interstate Commerce Commission. In such circumstances The Public Utilities Commission of Ohio was without jurisdiction and its order of March 26th, 1935, since upheld by the order of the United States District Court for the Southern District of Ohio, Eastern Division, under review, was a nullity and void;

2.

There was no evidence of substantial import introduced before The Public Utilities Commission of Ohio to sustain its finding to effect that there were no dealings in or with respect to said bituminous coals in course of its transportation from the mine in Pennsylvania, or Risher, Pennsylvania, or from Smith's Ferry, Pennsylvania, to Negley, Ohio; and that said coals throughout their movement from Smith's Ferry, Pennsylvania, to Youngstown, in Ohio, were not in through and continuous transportation in commerce;

3.

The admitted purpose and continuing intent on the part of the shipper to market in Ohio coals mined in and transported from points of origin in Pennsylvania constituted said coals while in course of such transportation and pending delivery at ultimate destinations, objects of interstate as opposed to intrastate commerce, the movement from Pennsylvania mines having been undertaken and carried on for purposes of sale or other commercial disposition to consumers or consignees at Ohio destinations.

4.

The continuing purpose and intent on part of the shipper and owner to sell or otherwise commercially dispose of coals shipped from one State to destination points in another State constitute such coals articles of interstate commerce, irrespective of whether the vessels or vehicles in which such transportation wholly or in part is effected are common carrier or privately owned.

5.

The shipments here in question were actually treated by carriers controlled by the shipper as in interstate commerce.

THE STATUTE.

Section 1 of the Interstate Commerce Act provides:

"(1) That the provisions of this part shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

"• • • • • • — from one State or Territory of the United States, • • • to any other State or Territory of the United States, • • •."

"(2) The provisions of this Act • • • shall not apply—

"(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid; • • •."

"(3) • • • The term 'railroad' as used in this Act shall include all • • • lighters • • • used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad • • • under a • • • agreement or lease and also all • • • spurs, tracks • • • of every kind used or necessary in the transportation of the • • • property designated herein • • • The term 'transportation' • • • shall include • • • cars, and other vehicles; vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied for the use thereof and all services in connection with the receipt delivery • • • and handling of the property transported."

Section 6:

"(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad * * *."

"(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; * * *."

THE CARRIERS CONCERNED.

The Pennsylvania Railroad Company, the Erie Railroad Company, The Baltimore and Ohio Railroad Company, and The Pittsburgh & Lake Erie Railroad Company, appellants here, are each and all common carriers by steam railroad, subject to provisions and requirements of the Act to Regulate Commerce as amended, owning and operating lines of of railroad engaged in the carrying of passengers and freight within and to and from the several States of Ohio and Pennsylvania. Each of said railroad companies is engaged in the transportation of coals in both interstate and intrastate commerce within said State of Ohio, particularly for consumption and use in and about the city of Youngstown, in said State.

The Pittsburgh, Lisbon & Western Railroad Company, spoken of as the "Lisbon", is a common carrier by steam railroad subject to the Act to Regulate Commerce as amended, owning and operating in both interstate and intrastate commerce a line of railroad from New Galilee, in said State of Pennsylvania, through Negley, Mill Rock and Signal, to Lisbon, all in the State of Ohio, a total distance of approximately 23.3 miles. It has interchange facilities and track connection with The Pennsylvania Railroad Company at New Galilee, with the Youngstown and Suburban Railway Company (hereinafter described) at Signal, and with the Erie at Lisbon.

The Youngstown and Suburban Railroad Company, hereafter spoken of as the "Suburban" or the "Y. & S.", is a railroad engaged in the transportation of bituminous coal and other commodities in both interstate and intrastate commerce by a line of railroad extending from Signal to Youngstown, both in Ohio, a distance of 22.2 miles. It is generally operated by electric power but has authority to use steam power if and when preferred.

It has interchange facilities and track connection with the Lisbon at Signal and with The Pennsylvania at and in Youngstown, Ohio.

PITTSBURGH COAL COMPANY.

The Pittsburgh Coal Company is a corporation under the laws of the State of Pennsylvania, with charter power, *inter alia,* to engage in the mining, production and sale of coal *and the transportation thereof to market;* its principal office and place of business are in the city of Pittsburgh, Pennsylvania, and it is lawfully registered to do business in the State of Ohio (R. 56).

It is the owner of a number of coal mines located upon and accessible to the Monongahela River in the State of

Pennsylvania, said mines being called "river mines" because of their location and "because their output is largely transported by barges over the river highways in any movement to market. These mines open into many thousands of acres of coal land owned by" said Coal Company (R. 58).

The Pittsburgh Coal Company was the shipper and claims to be the owner of the four car-loads of bituminous coal which were both the cause of and the occasion for the instant proceedings. The loaded coals were mined by the Pittsburgh Coal Company from its "river mines located on the Monongahela River, in the State of Pennsylvania", and moved by water in the Coal Company's barges from mines to a point at or near Smith's Ferry, Pennsylvania, where it was transferred from said barges into Coal Company's cars and thence moved over rails laid down by the Coal Company on lands which it owned, to Brush Run, Ohio, where, without pause or stoppage, it was put through a so-called preparation plant and dropped into waiting cars suitably placed by the Lisbon. From said Brush Run the Lisbon's cars so loaded were moved under Lisbon's power, via Negley, to Signal, a point on the main line of the Lisbon at its connection with the Y. & S., whence it was moved over the tracks of the latter to a point of connection with The Pennsylvania for interchange to the Erie and ultimate delivery by the Erie to consignees in Youngstown.

INTERCORPORATE RELATIONS OF—PITTSBURGH COAL COMPANY, PITTSBURGH, LISBON & WESTERN R. R. CO., and YOUNGSTOWN & SUBURBAN RY. COMPANY, AND THE BEARINGS THEREOF IN THE INSTANT PROCEEDINGS.

In 1927 the Pittsburgh Coal Company purchased the entire capital stock of the "Lisbon" and installed a new

board of directors made up of officers and agents of the Coal Company and other subsidiaries (R. 213).

In January, 1929, the "Lisbon" purchased approximately ninety-nine per cent of the capital stock of the Youngstown and Suburban Railway Company, and the then existing officers and directors of the latter were replaced "by the same officers and agents of the Coal Company who then formed the Board of the Lisbon."

June 7, 1929, the charter of the Youngstown and Suburban was amended to authorize it to construct a branch line from a point on its main line in the town of Columbiana, to a terminus in or near East Liverpool, both within the State of Ohio.

September 26, 1929, the Lisbon sold its holding of Y. & S. capital stock to Pittsburgh Coal Company for the price at which it had purchased such stock, and thereafter during the years 1929 and 1930 the Y. & S. built the branch line from Columbiana, Ohio, to a physical connection with the main line of the Lisbon at Signal, Ohio, using for such purpose "funds advanced by the (Pittsburgh) Coal Company, the Lisbon and certain affiliated companies" (R. 214).

The (Pittsburgh) Coal Company has dominated the affairs of the Lisbon and the Youngstown and Suburban since it became interested in them; it purchased them pursuant to a plan to secure cheaper transportation to the Ohio coal markets, and it has used and improved them as instruments in the furtherance of such a plan. A majority of the directors and of the officers of the Lisbon and the Youngstown and Suburban are officers or directors of the (Pittsburgh) Coal Company also; the officers of the railroad companies generally receive only one salary instead of separate salaries from each company; the same or adjoining offices are used by the three companies (the Lisbon and Youngstown & Suburban paying no rent), the Lisbon and Youngstown &

Suburban have common offices in Youngstown, several of the officers perform their duties for all the companies from the same desk, some being located in space generally devoted to the Coal Company and some in space generally devoted to its affiliated railroad companies; all three companies file a joint income tax return; and improvements of the Youngstown & Suburban have been financed by loans from the Pittsburgh Coal Company (R. 215-216).

Shortly after installation of the new Board of Directors of the Lisbon, consisting, as stated, of officers and directors of its new owner, the Pittsburgh Coal Company, the Lisbon applied to the Interstate Commerce Commission for authority (certificate of convenience and necessity) to build an extension from Mill Rock to Youngstown, Ohio, a distance of 24.4 miles, and a second extension from Negley, Ohio, to Smith's Ferry, Pennsylvania, a distance of 13.3 miles (R. 213 *et seq.*).

Pittsburgh Coal Company intervened on said application before the Interstate Commerce Commission "as an additional applicant," and The Pennsylvania and The Pittsburgh and Lake Erie, two of the appellants here, opposed said application (R. 213).

"The (Pittsburgh) Coal Company's purpose in purchasing the Lisbon and attempting to extend it was (as it declared before the Commission) to secure transportation of its coal to northeastern Ohio at a cost lower than the rates charged by the trunk lines for similar transportation" (R. 213. Findings, etc., West J., U. S. D. C. Nor. Dist. Ohio.)

In disposing of Lisbon's said application for certificate of convenience and necessity, the Interstate Commerce Commission observed that—

> "The principal objection to the proposed construction is that the bulk of the expected new traffic would

be diverted from the rail lines now handling it. * * * (150 I. C. C. Rep. 43, at p. 51. Cited R. 214.)

"It is not shown, however, that the rates proposed to be charged for the rail haul will be lower than the rates for similar service on existing lines. So far as the expected traffic of the principal shippers of coal is concerned, the proposal, in effect, is that the shippers by the use of their own conveyances and at their own expense will transport their coal to Smith's Ferry and there offer it to the rail carrier for shipment to the Youngstown industries. The movement from either Smith's Ferry or Beaver to Youngstown would be interstate and therefore directly within our jurisdiction. The important question for consideration is whether or not the public convenience and necessity require the construction of an additional rail line for the transportation between the river and the Youngstown district. * * * (150 I. C. C. 52.)

"It is also clear of record that the construction of the proposed new line would result in unnecessary duplication of facilities, if it is possible to make advantageous use of the existing lines of The Pennsylvania and the Pittsburgh & Lake Erie. The use of these lines between the Ohio River and the Youngstown district at reasonable rates would reduce the losses which the intervenors apprehend through the diversion of their traffic to the rail-and-water route proposed by the applicants.

"Authority to construct the proposed new line will not be granted until we are fully satisfied that a use of the existing rail routes between the Ohio River and the Youngstown district which will produce substantially the results proposed by the applicants is impracticable. * * * The record will therefore be held open and the proceedings assigned for further hearing in order that that phase of the evidence may be amply developed. The Pittsburgh & Lake Erie and The Pennsylvania will be expected to make their positions in regard to the proposed use of their lines entirely clear in order that we may be fully advised in the matter.

"The present applications contemplate the practical control and operation of a common carrier by its principal shipper, a condition to be avoided. Not only is it proposed that the railroad shall be thus controlled, but it is also proposed that the transfer facilities at the Ohio River shall be under control either of the applicants or of the Youngstown Sheet & Tube Company. Should it be found necessary, therefore, as a result of our further investigations, to grant a certificate for the construction of a new railroad line between Smith's Ferry and the Youngstown district, consideration will be given to the imposition of a condition that the Lisbon shall not be under the control, direct or indirect, of the Pittsburgh Coal Company or any other industry or industries, and the further condition that terminal facilities shall be provided on the Ohio River which shall not be under such control and shall be open to the free use of all shippers." (Ibid. 55).

Such were the conclusions and requirements of the Interstate Commerce Commission, arrived at December 8, 1928, (150 I. C. C. Rep. 43). They were promulgated December 16, 1928, and it is interesting to note that within one month thereafter, that is, in January, 1929, the Lisbon purchased upwards of ninety-nine (99) per cent. of the capital stock of the Y. & S., which at that time owned and operated an interurban electric line from Youngstown to Columbiana and Leetonia, Ohio, (R. 214).

Under date of March 16, 1929, the Interstate Commerce Commission, (150 I. C. C. Rep. 619)—further hearing having been held "for the development of additional evidence" and "to enable The Pennsylvania and the Pittsburgh & Lake Erie to make clear their positions in regard to the use of their lines," found that (150 I. C. C. 619):

"At the further hearing, the Pennsylvania announced that it would be prepared to provide facilities for the transfer of coal from barges to railroad cars, and fin-

ished steel products from cars to barges, at a point known as Conway, Pa., which is near Beaver and is 43.8 miles from Youngstown, and would furnish adequate transportation for these commodities on its existing tracks between Conway and Youngstown. The Pittsburgh & Lake Erie stated its willingness to provide similar transfer facilities at a point known as Colona, Pa., about 41 miles from Youngstown, and would likewise be prepared to transport like traffic on its existing tracks between Colona and Youngstown. * * * The Pennsylvania would also cooperate with the Pittsburgh & Lake Erie and the Baltimore & Ohio by offering those carriers trackage rights over its line between Conway and points of interchange with their lines, provided ample facilities should exist or could be provided at such points for handling the traffic. The Pittsburgh & Lake Erie also proposed to grant trackage rights to the Pennsylvania and the Baltimore & Ohio to enable them to reach the transfer at Colona, or to cooperate with the Pennsylvania, if found advantageous, in providing joint transfer arrangements at Conway or at Colona to be used in connection with trackage rights, thus avoiding construction of duplicate transfer facilities; * * *

"The facilities proposed to be installed by the Pennsylvania on its own line at Conway would include units for the handling of coal and of steel, together with connecting tracks, the whole estimated to cost $707,000. The coal-handling unit would cost $377,000 and would have a capacity of 1,000,000 tons per annum. Additional units could be provided at the same cost per unit.

* * * * * * *

"The Pittsburgh & Lake Erie at the time of the further hearing had secured an option on 77 acres of land on the river bank at Colona. In its brief, filed since the hearing, the carrier states that the option has been exercised. The cost of the land thus secured is $462,000. An unloading unit for handling coal, with

a capacity of 1,000,000 tons per annum, could be constructed there at an estimated cost of (ibid. p. 620) $250,000.

* * * * * * *

"the Pennsylvania tentatively proposed a rate of $1.02 per ton on coal from Conway to Youngstown, rates to other points involving the same haul, in whole or in part, to be established in relation to the rate named. * * * (ibid p. 621.)

* * * * * * *

"Whatever rates may be determined to be reasonable for the rail hauls, it is necessary to conclude that the service can be performed at less capital and operating costs by either the Pennsylvania or the Pittsburgh & Lake Erie than by the applicant ('Lisbon' and the Pittsburgh Coal Company) by way of Smith's Ferry and the proposed new line. It is also probable that the service by way of Conway or Colona and the trunk lines could be more expeditious than by way of Smith's Ferry. Location of the transfer facilities at Conway or Colona would reduce the river distance by more than 15 miles and would avoid the passage of several dams and locks * * * (ibid p. 623).

* * * * * * *

"We must assume, however, that the trunk lines will provide adequate service and reasonable rates in connection with river transportation. Counsel for both the Pennsylvania and the Pittsburgh & Lake Erie proposed that those carriers file line-haul rates on coal immediately, in order that investigation of their propriety may proceed while the needed facilities are under construction. The pending application for authority to construct the line from Smith's Ferry will be denied with the understanding that rates will be filed by the trunk-line interveners as proposed" (ibid p. 624; R. 213-214).

and a formal order was entered March 16th, 1929, by the Interstate Commerce Commission denying said application of the Lisbon to construct the proposed branch lines of road (ibid p. 624).

Within one month after the Interstate Commerce Commission had indicated intention (December 16, 1928) to deny the Lisbon's application "for authority to build an extension from Mill Rock to Youngstown, Ohio (28.4 miles) and a second extension from Negley, Ohio, to Smith's Ferry, Pennsylvania (13.3 miles) in event that the trunk lines, viz., The Pennsylvania, the Pittsburgh & Lake Erie and The Baltimore and Ohio, would "construct and furnish river-rail terminals, that is, facilities for removing coal from barges on the Ohio River and placing it in railroad cars, for transportation from such terminals to Youngstown and points in Northwestern Ohio," and before Lisbon's said application had been "unconditionally refused," as it was on March 16, 1929 (R. 213-214, citing 150 I. C. C. Rep. 49, 619), the Lisbon, owned as above stated one-hundred (100) per cent., or in entirety, by the Pittsburgh Coal Company, purchased (in January 1929) approximately 99 per cent. of the capital stock of * * * Youngstown & Suburban Railway Company above referred to then operating as a common carrier between Youngstown and Columbiana, both in Ohio.

First having replaced Y. & S. directors "by the same officers and agents of the Coal Company who then formed the Board of the Lisbon," the charter of the Y. & S. was amended on June 7, 1929, to authorize it (Y. & S.) to construct a branch line from a point on its main line in the town of Columbiana, to a terminus in or near East Liverpool, Ohio" and thereafter, on September 26, 1929, the Lisbon sold its entire holding of Y. & S. stock to Pittsburgh Coal Company, and

"During the years 1929 and 1930, the Youngstown & Suburban built a branch line from Columbiana to a physical connection with the main line of the Lisbon at Signal, Ohio, using funds advanced by the Coal Company, the Lisbon and certain affiliated companies. On May 26, 1931, the Youngstown & Suburban charter was again amended to authorize it to use steam motive power" (R. 214).

Again, after the Interstate Commerce Commission had refused (March 16, 1929) Lisbon's said application for authority to make extensions—

"the Lisbon constructed a branch or spur track from its main line at Negley down the valley of Little Beaver Creek for a distance of about one-half mile (towards Brush Run, Ohio). In 1931 and 1932 said (Pittsburgh) Coal Company purchased a strip of land between the south end of the Lisbon's said half mile spur and Smith's Ferry, Pa. * * * A small portion of this land was procured from the Lisbon.

"Upon said strip of land which is owned in fee simple and has been paid for by said (Pittsburgh) Coal Company, it has constructed at its own sole cost a standard gauge railroad track with one or more tunnels, bridges, etc., of a character similar to main line trackage, and designed to carry a large amount of heavy traffic in standard railroad coal equipment. Said track extends from the Coal Company's dock and river-rail terminal under construction at Smith's Ferry, Pa., northwardly to and connects with the south end of said Lisbon switch near Negley, a distance of some thirteen miles. The cost thereof was approximately $1,400,000. This creates a rail connection which in its physical aspects is substantially similar to the extension desired by the Lisbon when it made its application for extension" (R. 214-215).

"At Brush Run, some two miles south of Negley and a short distance from the track between Negley and Smith's Ferry (Penna.) and connected therewith by

switch tracks, said (Pittsburgh) Coal Company has erected a coal washing plant, for cleaning, sizing and preparing its coal for market. • • •

"The (Pittsburgh) Coal Company intends to employ on all said trackage between Smith's Ferry (Penna.) and the Lisbon connection only its own locomotives and cars handled by its own employees.

• • • • • • • •

"The (Pittsburgh) Coal Company has dominated the affairs of the Lisbon and the Youngstown and Suburban since it became interested in them; it purchased them pursuant to a plan to secure cheaper transportation to the Ohio coal markets, and it has used and improved them as instrumentalities in the furtherance of such a plan. A majority of the directors and of the officers of the Lisbon and the Youngstown and Suburban are officers or directors of the (Pittsburgh) Coal Company; &c., &c. (R. 215-216).

Appurtenant to its said coal preparation plant at Brush Run, Ohio, the Pittsburgh Coal Company owns and operates at Smith's Ferry, Pennsylvania, on the Little Beaver River, near its confluence with the Ohio, track facilities and an unloading dock which has connection with the preparation plant and facilities at Brush Run and with the rails of the Lisbon at Negley, all by means of the "standard gauge railroad track with one or more tunnels, bridges, etc., of a character similar to main line trackage", above referred to (R. 214). It "also owns and operates its own river fleets and barges on the Ohio and Monongahela Rivers" for the transportation of its coal (R. 56, 58, 59).

Referring to the railway track extension from Pittsburgh Coal Company's dock and river-rail terminal at Smith's Ferry, Pennsylvania, northwardly to and connected with the south end of the Lisbon's switch near Negley, it may be

said in passing and by way of information as to matters relating to but probably not immediately in issue in the instant case, that the Pennsylvania and the Pittsburgh & Lake Erie have and do now contend that said line was improperly and unlawfully constructed; that it is in truth but an extension of the Lisbon; a camouflaged production of one of the extensions desired by the Lisbon which the Interstate Commerce Commission, as above, had declined to permit it to make; that even if it should serve but a single carrier, it none the less violates paragraph 22, section 1, of the Interstate Commerce Act because it crosses a State line; that the intent of the Coal Company was and is to evade this law; that with such intent its act as the sole stockholder of the Lisbon which had been denied the right to build, should be regarded as the act of the Lisbon; that the separate corporate entities should be disregarded and that authority to build same was essential under paragraphs 18 to 22, inclusive, of section 1 of the Interstate Commerce Act.

A suit under paragraph 21, section 1, of the Interstate Commerce Act, to enjoin construction and operation of this track extension was instituted by appellants here in the United States District Court for the Northern District of Ohio, Eastern Division, in 1934; the bill of complaint has been dismissed and the cause is now pending on appeal before the Circuit Court of Appeals for the Sixth Circuit, where it has been argued and submitted.

THE RATES.

The published rates applicable on interstate traffic from the Suburban (Y. & S.)-Pennsylvania interchange to Youngstown destinations on the Erie are higher than the rates established by the Ohio Public Utilities Commission applicable on intrastate traffic from same interchange to same destinations.

Prior to the tender for switching of the four carloads of coal The Pennsylvania, to aid it in the performance of its duty to make appropriate applications of its duly published rates, had issued and delivered to the Y. & S. a notice in writing which reads as follows:

"The Pennsylvania Railroad Company

Notice of Prepayment

September 18, 1934.

"Effective at once this Company will not accept shipments of bituminous coal, carloads, from the Youngstown and Suburban Railway at its interchange in Youngstown, Ohio, for delivery to individuals or industries on its own or connecting lines within the switching limits of Youngstown which do not originate at mines within the State of Ohio, until all charges from its connection with the Youngstown and Suburban Railway to point of ultimate delivery are fully prepaid at rates published in tariffs on file with the Interstate Commerce Commission.

J. B. McCorkle, General Coal Freight Agent" (R. 77).

The shipment and routing of each of said four cars was covered by standard form shipping orders delivered by the Coal Company to the Lisbon at Negley, and for each car so loaded the Lisbon issued its uniform bill of lading receipt; the transportation movement of the loaded cars from Negley via Signal to Youngstown and delivery points (consignees) was wholly within Ohio. The Lisbon received and billed the loaded cars "as Ohio intrastate commerce" and accepted prepayment of freight charges to destinations "at the Ohio intrastate rates." (R. 9).

WHEN TENDERED BY THE Y. & S. TO THE PENNSYLVANIA FOR INTERCHANGE TO THE ERIE THE PENNSYLVANIA REFUSED TO ACCEPT SAID SHIPMENTS UNLESS PREPAID AT PROPERLY APPLICABLE INTERSTATE TARIFF RATES.

When the four loaded cars were tendered by the Y. & S. by placement in the usual manner "on the Y. & S.-P. R. R. interchange track at Youngstown accompanied by the usual advice to switch to the Erie for delivery to the named consignees", the Pennsylvania (the Erie concurring) "refused to accept the said shipments until charges, in accordance with their tariffs applicable on interstate commerce and lawfully on file with the Interstate Commerce Commission, were paid" (R. 5, 9).

Such legal charges have never been tendered either by the Y. & S. or by the Pittsburgh Coal Company, or any other party interested, and the cars with their loads presumably at least, rest at said interchange.

PROCEEDINGS BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO.

With commendable promptness the Y. & S. petitioned The Public Utilities Commission of Ohio for an order which would require The Pennsylvania, an intermediate carrier, and the Erie, as the delivering carrier, "to switch and deliver to consignees in Youngstown, Ohio, at rates and charges applicable on Ohio intrastate coal traffic, (said) four carloads of bituminous coal brought into Youngstown by the Y. & S. as a road-haul carrier" (R. 8).

The Report of the Public Utilities Commission of Ohio appears at pages 8 to 41, both included of the Transcript of the Record and the Commission's Order which notified and required both The Pennsylvania and the Erie "to cease and

desist on or before April 10, 1935, from * * * refusing * * * to transfer, switch and deliver to the named consignees thereof in Youngstown, Ohio, the four carloads of bituminous coal, * * * at the Ohio intrastate rates or charges applicable for such switching service and in effect at the time said shipments were offered to the defendants (Pennsylvania and Erie) in Youngstown by the Youngstown and Suburban Railway Company, &c., appears at R. 41-42.

Said order is dated March 26, 1935 (R. 41).

PROCEEDINGS BEFORE THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

April 15, 1935, complainants The Pennsylvania and the Erie, filed their bill of complaint in the District Court of the United States for the Southern District of Ohio, Eastern Division, against The Public Utilities Commission of Ohio and John W. Bricker, Attorney General of the State of Ohio, to enjoin, set aside and annul said order of said Commission.

Complainants prayed for the convocation of a statutory three-judge court and for an interlocutory as well as permanent injunction (R. 7, 51).

Petition of Pittsburgh Coal Company for leave "to intervene as party defendant" in the District Court, and order granting such leave may be found at pages 56 and 61 of the Record.

The sworn answer of the Pittsburgh Coal Company, "Intervening Defendant" appears at pages 61-66, both included, of the Record.

The fifth paragraph of said answer which appears at page 65 of the Record is both apposite and interesting.

As originally convoked the statutory court was composed of Hicks, Circuit Judge and Hough and Nevin, District Judges (R. 49).

Complainants' motion for interlocutory injunction was duly assigned for hearing at Columbus, Ohio, before the court so composed on May 11, 1935, (R. 52) but was not then heard because of an accident which prevented the court from convening.

It came on for hearing on September 23, 1935, before the court then composed of Florence E. Allen, Circuit Judge, with Hough and Nevin, District Judges, and was submitted as on hearing for final decree, the Public Utilities Commission of Ohio, at suggestion of the court by appropriate order, having first extended the effective date of its order complained of to January 2, 1936 (R. 220).

Pending decision, on November 19, 1935, District Judge Hough died, and final decree was entered December 11, 1935 (R. 69, 70).

Appeal to this Court and motion for Maintenance of *Status Quo* was filed January 3, 1936, and formally allowed the same date (R. 218, 223).

IMMEDIATELY PERTINENT FACTS STATED IN GREATER DETAIL.

The application of the Lisbon joined in by the Pittsburgh Coal Company as intervening "additional applicant," to construct two branch lines from Lisbon's main line, the one northward from Mill Rock to Youngstown, all in Ohio, a distance of 28.4 miles, and the other southward from Negley, in Ohio, to Smith's Ferry in Pennsylvania, a distance of 13.3 miles, having been definitely refused by the Interstate Commerce Commission on March 16, 1929, the disappointed applicants, united in ownership as also in de-

sire and hope, counseled inwardly as to how their object, viz., the movement of coals from mines in Pennsylvania for sale at market destinations in Ohio at rates for the transportation materially less than those prescribed by published tariffs on file with the Interstate Commerce Commission, might otherwise by indirection and as some may think illegally, though practically, be accomplished.

The *locus* and the physical relationship of the several carriers to each other and the named points such as Smith's Ferry, Little Beaver Creek, Brush Run, Negley, Signal and Columbiana, necessarily touched in the transportation course of coal in movement from Pittsburgh Coal Company's mines in Pennsylvania to Youngstown destinations in Ohio, and the relation of the whole to the interstate boundary between said states quite plainly appears on the sketch map appended at the end of this brief.

In January, 1929, that is, between the dates of the first or tentative announcement (December 16, 1928) of the Interstate Commerce Commission and of its final denial on March 16, 1929, the Lisbon had purchased the Youngstown and Suburban and replaced its board of directors with officials from the roster of the Lisbon and the Coal Company; had amended on June 7, 1929, as permitted by the law of Ohio, the charter of the Y. & S. so as to authorize construction of a north-south branch line from Columbiana to form a connection with the Lisbon at Signal, and very shortly thereafter had transferred its entire holding of capital stock of the Y. & S. to the Pittsburgh Coal Company.

In 1931 and 1932, the Pittsburgh Coal Company purchased a strip of land between the south end of the half-mile spur of the Lisbon and Smith's Ferry, Pennsylvania (R. 214) and constructed thereon a standard gauge railroad track between those points designed to carry a large amount of

heavy traffic in standard railroad coal equipment. This construction was at the sole cost of the Pittsburgh Coal Company. A rail-river terminal previously constructed at Smith's Ferry, Pennsylvania, in the mouth of Little Beaver Creek, approximately at its juncture with the Ohio River was likewise wholly owned by the Coal Company, and its rived-rail terminal was provided, with rail facilities extending northwardly to and connecting with the south end of the Lisbon switch near Brush Run and Negley, both in Ohio.

In the pleadings and at various other places in the record and in this brief the trackage from Smith's Ferry, Pa., to Brush Run, Ohio, and connection with the Lisbon spur south of Negley, Ohio, is referred to as the privately owned track or facility of the Pittsburgh Coal Company but appellants have not at any time admitted that such trackage was or could have been lawfully constructed in absence of a certificate of convenience and necessity first duly granted by the Interstate Commerce Commission.

That question is now pending before the United States District Court, Northern District of Ohio, Eastern Division.

The Lisbon connects with the Suburban at Signal, Ohio, and the Suburban in turn runs north to Youngstown, all as quite plainly on said sketch map appears. The Pittsburgh Coal Company, temporarily at least, seems thus to have accomplished for itself indirectly, improperly and probably illegally what the Interstate Commerce Commission had refused to permit it to accomplish directly (150 I. C. C. 619).

On August 2, 1934, certain coal mined in Pennsylvania by the Pittsburgh Coal Company was loaded in its own barge and by it moved down the Monongahela River to Risher, Pennsylvania, where it was held in a harbor maintained by the Coal Company. Twenty-three days later, on to-wit, August 25, 1934, the movement of the coal into Ohio

commenced. It moved by barge again down the Monongahela and Ohio Rivers to Smith's Ferry at the mouth of the Little Beaver River. It was then in the condition in which it is sold to consumers along the Ohio River. Any and all coal unloaded from barges at Smith's Ferry in Pennsylvania and loaded upon railroad cars must move thence into the State of Ohio only. The coal here in question was transferred from barge to car at Smith's Ferry, Pennsylvania, thence moved to Brush Run, Ohio, the point where the newly constructed railroad of the Pittsburgh Coal Company connected with the south end of the spur of the Lisbon and where the Coal Company had constructed a washing or cleaning plant. Upon arrival at Brush Run and without pause, the coal continued its movement through the cleaning plant and was loaded directly into cars furnished by the Lisbon. There is no consumption of coal either at Smith's Ferry or at Brush Run and no stock piles of coal, before or after cleaning, are maintained at Brush Run. The movement is continuous from Smith's Ferry, Pennsylvania, into cars at Brush Run for movement to ultimate destination in Ohio.

At Smith's Ferry, the coal was held in barges from August 25, 1934, until approximately the middle of the following month when it was unloaded into cars, moved to and through the cleaning plant at Brush Run and loaded into four cars furnished by the Lisbon. While the coal was in barges on the Ohio River, in Pennsylvania, en route to Smith's Ferry, instructions were given by the Pittsburgh Coal Company to its representative in Youngstown to find purchasers in Ohio (R. 144-149) and these particular car loads of coal "were sized in accordance with the orders taken for the coal by our sales manager at Youngstown, Ohio, from the customers to whom these cars were to go" (Morrow R. 146). These four cars were transported on

September 12, 1934, by the Lisbon to its connection with the Suburban at Signal. The Suburban in turn hauled the cars to Youngstown, Ohio, and on September 19, 1934, tendered them to The Pennsylvania Railroad Company, its direct connection at Youngstown, to be turned over to the Erie Railroad Company and delivered by that line to consignees located on its rails.

Having knowledge of the foregoing facts, and believing also that the transaction constituted an attempt to evade the lawful interstate charges for switching at Youngstown, The Pennsylvania Railroad Company, in the exercise of its common law right and in accordance with its lawfully published tariffs on file with the Interstate Commerce Commission, had issued a "Notice of Prepayment" under date of September 18, 1934, to the effect that bituminous coal mined outside the State of Ohio would not be accepted from the Suburban at Youngstown for delivery to consignees located on the Pennsylvania or connecting lines "until all charges from its connection with the Youngstown & Suburban Railway to point of ultimate delivery are fully prepaid at rates published in tariffs on file with the Interstate Commerce Commission." Both the Pennsylvania and the Erie were at all times and are now ready and willing to accept and transport the cars here involved and all future traffic under like circumstances upon prepayment of the lawfully applicable interstate rates and charges. Both the Suburban, and the Coal Company, the shipper, have refused and continue to refuse to prepay the interstate charges and as a consequence the four carload shipments remain on the Suburban-Pennsylvania interchange track at Youngstown.

There is no controversy between the parties as to facts so stated and as disclosed by the record. Reasonably there can be none as to the verity of the statements made and as they may be hereinafter extended, for in every particular

the statements are and on examination will be found to be supported by the record, the Report and Findings of the Interstate Commerce Commission, the Report and Findings of and the Record of Proceedings before the Public Utilities Commission of the State of Ohio, of the Memorandum Opinion on Motion for Preliminary Injunction and Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Ohio, Eastern District of Ohio, and by admissions of Record made in pleadings filed by defendants in the District Court below, where the cause was heard on the pleadings and the Record before the Public Utilities Commission of Ohio, and the argument of counsel (R. 69).

The controlling question for the consideration of this Court is whether in the circumstances disclosed by the entire record the traffic, viz., the four car loads of bituminous coal, all of which was extracted from mines located in Pennsylvania owned and operated by Pittsburgh Coal Company, barged down the Monongahela River in barges and in tow of tug boats owned by the Coal Company to a river landing and so-called harbor at Risher, Pennsylvania, also owned and controlled by the Coal Company, thence further barged to the Coal Company's dock and unloading facilities at Smith's Ferry, Pennsylvania, where the traffic was transferred from barge to Coal Company's own cars, thence moved over Coal Company's own rails to contact with the Company's coal washer or preparation plant at Brush Run, Ohio, thence through the washer and dropped in cars suitably placed by the Lisbon and under Lisbon's power moved to and through Negley by employes of the Lisbon, which as stated is completely owned by the Coal Company, to and through Signal, in Ohio, where it was delivered to and thence transported by the Y. & S. which in turn, with exception of qualifying shares of its Directors, all of whom

were officers and directors of the Coal Company, was also completely owned by the Coal Company, all for transfer to the Erie for delivery to named consignees in Youngstown, was and is subject to rates prescribed in interstate tariffs published and on file with the Interstate Commerce Commission, or subject only to the lower intrastate rates prescribed by tariffs on file with the Public Utilities Commission of Ohio.

In considering and deciding that question the fact that the coals were currently mined from the Coal Company's mine in Pennsylvania "along with the rest of the day's outturn," that is, along with "other orders placed at that mine for coal" (R. 147) and in the regular course of business by the Coal Company, which was engaged in the business of mining, transporting and selling coal; that the Coal Company needed "to sell the amount of business that it can from those mines, utilizing the river transportation as far as possible"; that "the logical market for that coal (so mined in Pennsylvania) is northeastern Ohio, because it is the kind of coal that is not mined in Ohio, it is gas and by-product coal; that there is no coal of that character in the State of Ohio; that the steel industries, the manufacturers' industries of northeastern Ohio are dependent on coal of that character"; that "it is to the advantage of the Pittsburgh Coal Company to increase its sales of that type of coal in that market, and that as a business proposition it is to the advantage of the Coal Company and the consumers in that territory to utilize the cheap water transportation as far as possible" (J. D. A. Morrow, President, Pittsburgh Coal Co.; R. 144) should be constantly in mind.

Further, that with respect to the coals specifically involved in this controversy, the President of the Coal Company, Mr. Morrow, testified that on or about the 25th day of August, after the coals had been mined and lay on board

of barge, he directed the Company's "Sales Department to start a movement of coal over this road (route) into northeastern Ohio," because "at that time they advised me (Morrow) that it was ready for operation" (R. 147) "and they started the movement of coal up there. This happened to be the first barge that went. The Sales Department instructed our Sales Manager at Youngstown to take orders for coal from this Brush Run plant, find out what kind of coal the users in Ohio wanted and sell it to them, which was done" (R. 148).

Orders for coal for Ohio destinations "are filled at this Brush Run plant," but "each order is reported to our (Coal Company's) Sales Department at Pittsburgh * * * all of our different branch offices in any part of the United States or Canada report their sales daily to our office in Pittsburgh so that we have touch with all the business of the Company."

The witness (Mr. Morrow) further testified that "in all probability the coal was on the (its) way before the orders (of purchase) were received for it. That is usually the case with a large part of the coal that is mined. A part of it you have contracts for and another part you sell from day to day and this particular coal was an illustration of the current day by day sales. So I would say, Mr. Examiner, that without knowing exactly about it, the probabilities are that Mr. Egan (Sales Manager) at Youngstown obtained orders for that coal between the time the barge reached Risher (Pennsylvania) landing and the (time the) cars were loaded at the Brush Run plant * * *. Within that period of time he was advised that a barge load of coal was on the way and there would be further movement of coal and he could sell it" (R. 148). This evidence was not in anywise or particular attempted to be controverted. It stands unimpeached.

That these coals constituted commerce between the States of Pennsylvania and Ohio would seem to be too clear for question. Whether the fact that a part only of the entire transportation between origin in Pennsylvania and destinations in Ohio was accomplished by common carrier facility, changed or could change commerce so conducted from commerce between States to commerce solely within a single State is the question upon which the final disposition to be made of this cause would seem to turn.

ARGUMENT.

Commerce is trade, it is traffic. It is the interchange of goods, of merchandise and articles between traders, and merchants,—between those who have and those who desire to acquire. Neither specification as to the object nor the reason for its desired acquisition is important. That one possesses and another is able and willing to acquire for value constitutes the very soul of exchange, of trade, of commerce. Whenever a commodity or object of value has begun to move as an article of trade between owner and prospective buyer commerce exists. The movement of articles of trade by owner to the market place in the search for an able and willing purchaser is commerce in the making. The intent of the owner as well as his desire to seek a market and consummate a trade constitutes the particular article an article of commerce. It may be readily conceded that the mere movement of an article from place of its production to place of consumation by its owner will not impress the article in its movement with commercial quality, but if the intent of the owner in its moving i. e. transportation is to make transfer for value the movement constitutes transportation and assumes commercial quality, for commerce includes the transoprtation as well as the purchase, sale and exchange of commodities. Commerce is a unit, every element of which is indicated by the term.

If the movement from owner to purchaser takes place solely within the confines of a single State, it constitutes transportation in intrastate commerce but whenever a commodity has begun to move as an article of trade from one State to another commerce between the States has commenced. The intervention of the State boundary line, although unmarked and invisible cannot be disregarded.

The fact that several different and entirely independent agencies may be engaged in the transporfation of a commodity in commerce between States, some of which agencies act entirely within one State and others in or through two or more States, does not detract from the interstate character of the transportation. Each agency to the extent of its participation in the interstate movement is subject, to the rules and regulation of the interstate regulatory power.

The purchase of the Lisbon in 1927 by the Pittsburgh Coal Company which owned and operated mines in Pennsylvania, was an initial step in a general plan on part of the Coal Company to effect the marketing in Ohio of its coals mined in Pennsylvania. The Coal Company's application through the Lisbon submitted to the Interstate Commerce Commission for authority to construct correlated branch lines between Smith's Ferry, in Pennsylvania, via Lisbon and Mill Rock, to Youngstown, proclaimed beyond denial that intent and that purpose, and it is the contention here of appellants that when by denial on part of said Commission that intent and purpose was thwarted on March 16th, of 1928, the potential as well as purposeful desire on part of the Coal Company to establish interstate transportation of its desirable commodity for sale in the Youngstown market none the less persisted.

Undeterred by the Interstate Commerce Commission's expressed view that "the practical control and operation of

a common carrier by its principal shipper was a "condition to be avoided" and its declaration that if upon further investigation it should be found reasonable "to grant a certificate for the construction of a new railroad line between Smith's Ferry and the Youngstown district, consideration will (would) be given to the imposition of a condition that the Lisbon shall not be under the control, direct or indirect, of the Pittsburgh Coal Company or any other industry or industries." * * * the Coal Company in January, 1929, acting indirectly through the Lisbon, which it owned in entirety, acquired the Youngstown & Suburban, reconstructed its Board of Directors and in due course by its own funds mingled with those of the Lisbon constructed the connecting link between Columbiana and Signal and thereafter with its own funds on its own privately acquired lands suitable for right of way purposes, laid down its own rails between its docks and terminal facilities at Smith's Ferry and Negley. It is over the through route from Smith's Ferry, Pennsylvania, via Brush Run, Negley, Signal and Columbiana in Ohio, that the traffic owned and shipped initially from the Coal Company's river mines in vicinity of Pittsburgh, moved to the point of interchange between the Y. & S. and The Pennsylvania, where as understood and indicated it still reposes. To off set supposable contempt predicated upon disregard of the Interstate Commerce Commission's pronouncements, the Coal Company arranged for the movement from mines of origin through Smith's Ferry and its Brush Run washer to Negley, without bills of lading, but still as both owner and shipper of the partly moved traffic and owner of the Lisbon and the Y. & S., it effected issuance of bills of lading to cover the balance of the movement between Negley and the Youngstown destinations.

As long ago said by this Court in *McCall* v. *California*, 136 U. S. 104, "commerce" as used in the United States

Constitution, Article 1, Section 8, clause 3, includes the fact of intercourse and of traffic and the subject-matter of intercourse and traffic. The fact of intercourse and traffic embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and comprehends the act of carrying them on at these places by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons.

This definition of commerce in its entirety may be thought to have been somewhat restricted by the further pronouncement of this Court in *Adair* v. *United States,* 208 U. S. 161, to effect that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph and every species of commercial intercourse but not that commerce completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states.

In *Swift & Co.* v. *United States,* 196 U. S. 375, it was ruled that commerce among the states is not a technical legal conception but a practical one to be drawn from the course of business, and again in *Public Utilities Commission* v. *Landon,* 239 U. S. 236, it is said that what falls within commerce must be determined upon consideration of established facts and known commercial methods; and again in *Texas & New Orleans Ry. Co.* v. *Sabine Tram Co.,* 227 U. S. 111, it is said that it is the nature and the course of the traffic, and not its accidents which determines its character as inter- or intra-state.

Substance and not form controls in determining whether a particular transaction is one of interstate commerce and so the mere method of delivery is a negligible circumstance

if in substantial fact the transaction under the facts of a given case is "interstate commerce." *Heyman* v. *Hayes,* 236 U. S. 178.

In *Federal Trade Commission* v. *Pacific States Paper Trade Association,* 273 U. S. 52, it was expressly determined that interstate commerce is not confined to transportation nor, as we venture to interject, to the means by which transportation is effected, but comprehends all commercial intercourse between different states and all component parts of such intercourse, including the buying and selling of commodities for shipment from one state to another. In such a definition it takes no great stretch of the imagination to include with the buying and selling of commodities for shipment, the mining of commodities in one state with the abiding intent and purpose of shipping the output to another state for sale, if and when such intent and purpose is evidenced by the actual starting of the commodity on its way.

See *Coe* v. *Erroll,* 116 U. S. 517, where this Court held: that commodities (there logs) were in interstate commerce when they had "actually started in the course of transportation to another state or (had been) delivered to a carrier for (such) transportation," on a continuous journey.

Neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is essential to interstate commerce:

Baltimore & Ohio Southwestern R. Co. v. *Settle,* 260 U. S. 166, 171,

> "In determining whether commerce is interstate or intrastate regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate the power of Congress attaches to it and the provisions of the Act to Regulate Commerce enacted for the purpose

of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply."

Pennsylvania R. R. Co. v. *Clark Coal Co.*, 238 U. S. 456, 465, 466.

In *Covington Railway* v. *Covington*, 235 U. S. 537, 545, it was said even more positively, if this be possible, that:

"This Court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states, the mere arrangements of billing or plurality of carriers do not enter into the conclusion."

See also:

Louisiana Railroad Com'n v. *Texas & Pacific Ry.*, 229 U. S. 336, 340;

Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498;

United States v. *Erie R. Co.*, 280 U. S. 98, 101, and the numerous applicable cases therein cited;

Ohio Railroad Com'n v. *Worthington*, 225 U. S. 101.

EFFECT, IF ANY, OF PART-WAY TRANSPORTATION IN SHIPPER'S OWN VEHICLES.

Before the Public Utilities Commission of Ohio as well as before the District Court below it was contended by the Pittsburgh Coal Company and pressed to successful conclusion that because the coal moved part way toward its plainly intended destination in barges and over rails owned by the shipper, neither commerce nor commercial transportation had begun until when after the coal had been put through the washer, and been tendered to the Lisbon at Negley, a standard form bill of lading covering the further

movement from Negley to Youngstown destinations had been issued.

Considered in the light of the many decided cases above cited and quoted from, such contention would seem to be unsubstantial and without solid foundation.

Even if the statements of the Coal Company as to the ownership of the barges and of the facilities including the rails up to Negley and as to their operation solely for owner purposes as opposed to common carriage be accepted as true it would seem to be unimportant and but mere incidents of the transportation movement when the essential character of the commerce dependent upon such movement is considered. That the owner and shipper, that is, the Pittsburgh Coal Company, actually started the coals on a predetermined and intentioned journey from owner's points of production in Pennsylvania to open markets in northeastern Ohio to be there sold or delivered to *en route* purchasers are the essentials that define both the transportation and the character of the commerce and determine both the obligations and the rights of any intervening carrier under applicable law.

Knowing as it did and was bound to know that the coal constituting the commerce had originated in Pennsylvania and was being transported by common carriers to Ohio destinations on intrastate billings which, if false, might subject intermediate or terminal carriers accepting same to heavy penalties at the instance of others, was The Pennsylvania to ignore the known fact of origin and complacently make itself party to seemingly obvious fraud?

Commerce between the States is a practical matter. It cannot be transformed into commerce solely intrastate by effecting a part of its necessary transportation whether that be small or large, by means and facilities not primarily subject to Federal control.

The record plainly shows that when the coal arrived by barge at Smith's Ferry, Pennsylvania it was not intended to move nor could it move elsewhere than into Ohio. There was no consumption at Smith's Ferry, Pennsylvania, and there was no practical means, other than dumping into the river as waste, of disposing of the coal at that point. Likewise, at Brush Run there was and is no consumption of coal nor is there any possibility of disposing of it for use commercially at that point. Coal brought by barge to Smith's Ferry cannot sanely be intended for ultimate consumption commercially at any point in Ohio which can be reached without the employment of common carrier facilities. From Smith's Ferry, Pennsylvania, all the coal intended for trade must be moved to destinations in the adjoining state of Ohio, and some part of its transportation through that state must be over a common carrier. Pittsburgh Coal Company's intention originally manifested and expressly declared when the application for leave to construct the branch lines was filed before the Interstate Commerce Commission, the known facts surrounding the movement of this coal from Smith's Ferry to Youngstown, the lack of ability to deliver it at any market point in Ohio without the aid of a common carrier, the publicly manifested intention on part of the Coal Company to market Pennsylvania Coal in Ohio with the facilities which it had therein assembled, all establish the continuing purpose of Pittsburgh Coal Company, and the essential elements necessary to impress this traffic indubitably with interstate status.

Southern Pacific Terminal Company v. *Interstate Commerce Commission and Young* (two cases), 219 U. S. 498, *et sequitur,* would seem to be very much in point and in principles enunciated to afford full refutation of appellees contention.

Young was a shipper of cottonseed products at the port of Galveston, Texas. He leased from The Southern Pacific

Terminal Company, a corporation organized to construct and maintain wharves and docks for the accommodation of all kinds of vessels and particularly to construct and maintain terminal facilities "for the use of what are commonly called the Southern Pacific Railway and Steamship Systems" docking space for preparing and forwarding his products beyond the port.

The Galveston, Harrisburg and San Antonio Railway in which the Southern Pacific Company, a holding company, owned stock, was the only railroad having physical connection with the tracks of the Terminal Company, which owned track facilities located on its own lands. The Terminal Company owned no cars or locomotives and issued no bills of lading. It owned no stock in any of the railroads or corporations in which the Southern Pacific owned stock. It carried on a wharfage business and published a schedule of charges for such business which it did not file with the Interstate Commerce Commission. The Terminal Company was a party to circulars issued by the Southern Pacific Company for advertising purposes. It charged a fixed wharfage for all freight passing over its piers to or from vessels berthed thereat and upon certain idle and otherwise useless lands owned by it. Pursuant to negotiation with Young, it constructed a pier for Young's use, and erected thereon a warehouse and platform, all at an expense of $65,000 and for the use of which Young agreed to pay the Terminal Company a yearly rental of $15,000. He took possession of said pier and improvements, paid the price stipulated and erected thereon, presumably at his own expense cottonseed cake sacking and grinding machines at an outlay of approximately $50,000.

A competitor in the business of buying, selling and converting cotton seed cake and meal, complained to the Interstate Commission against the Southern Pacific Company and the Terminal Company that the arrangement with

Young constituted a violation of Section 3 of the Act to Regulate Commerce, giving him an undue and unreasonable preference and advantage over his competitors. Young was not made a party to the proceedings before the Commission but he appeared and testified as a witness for the Terminal Company. The Commission, upon consideration, required the defendant companies "to ceaes and desist" from granting Young the alleged undue preference. On appeals this Court, speaking through Mr. Justice McKenna, said:

> "(p. 517) The situation challenges attention. Appellants find in it nothing but the natural and legal result of the sagacity which could see an opportunity for profit and the enterprise which could avail of it. It was the simple matter on the part of Young, it is contended, of bringing his business to the ship's side and cutting out intervening expenses. And it is said that the Terminal Company had an equally lawful inducement. It had an idle property, • • • over which it had absolute control and which it turned into use and profit by the arrangement with Young. And this, it is insisted, was a simple exercise of ownership.
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> "(p. 521) Another and an important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the Terminal Company is a wharfage company or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts, the Terminal

Company as well as the railroad companies. As said by the Interstate Commerce Commission, 'the Terminal Company was organized to furnish terminal (p. 522) facilities for the system at the port of Galveston,' • • • 'forms a link in this chain of transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single corporation.' • • • Surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As well said by the Interstate Commerce Commission, 'a corporation such as this Terminal Company, which has "competing lines," should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company. • • • The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority.'

"The reasoning of the Commission is justified by the (p. 523) statute. It includes in the term 'railroad' 'all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, • • • and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of • • • property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of said property.' • • • The record does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organized system. And it is

with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and (p. 524) made single by it. * * *

"(p. 525) The last contention advanced is that 'the order of the (Interstate Commerce) Commission transcends its jurisdiction, in that it regulates commerce purely State and intrastate, and also purely foreign commerce, neither of which is subject to its authority.'

"In support of this contention it is insisted that the evidence shows * * * the cake and meal purchased by Young are bought by him * * * chiefly in Texas and shipped to him on bills of lading and way bills, showing (p. 526) the point of origin in those States and the destination at Galveston (Texas). *The purchases are made for export, there being no consumption of the products at Galveston.* His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston. At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him. * * *

"This evidence establishes, appellants contend, that the transit of the cake and meal is absolutely ended at the leased premises at Galveston, and that it is 'a final point of concentration and manufacture, the cotton seed cake being there manufactured into meal and sacked for export.' * * * *The manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the trans-shipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise* (p. 527) *would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy.* It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point

was Galveston or some other place in Texas. *They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination,* the Terminal Company being a part of the railway for such purpose. The case therefore, comes under *Coe* v. *Errol,* 116 U. S. 517, where it is said that *goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State,* or (been) delivered to a carrier for transportation.' * * *'' (Italics supplied.)

It is submitted that there is sufficient of resemblance in the matter and the methods adopted to achieve forbidden advantage and to thwart the purpose of the Congress as expressed in the Act to Regulate Commerce, between the cited and the instant case, to make the arguments advanced as bases for decision in the *Young* case well worthy of consideration and application in principle to the case at bar.

Compare also *Cin., N. O. & Tex. Pac. Ry.* v. *Interstate Commerce Commission,* 162 U. S. 184, at 191 *et seq.*

In the instant case Pittsburgh Coal Company, an owning producer and shipper of coal through wholly owned common carrier subsidiaries, has sought by the device outlined, which necessarily must invite question and close scrutiny, to attaint commerce, in every essential respect interstate with a local intrastate quality and character.

In *Railroad Commission of Ohio v. Worthington, Receiver of Wheeling & Lake Erie R. R. Co.,* 225 U. S. 101, an order of a State Commission establishing a given rate on so-called "Lake-cargo coal" from the Number Eight Coal Field in eastern Ohio to the ports of Huron and Cleveland, Ohio, was attacked and a permanent injunction granted on the ground that the rate fixed by the local Commission which in-

cluded in its application the placement of the coal under movement into vessels ready to be carried beyond the State destination was "as to merchandise intended for points beyond the State, a burden on interstate commerce and beyond the power of the State to impose, even if the merchandise is billed from a point within the State to the (another) point (within the State) where the vessel" may be, and it was further decided on citation of *Southern Pacific Terminal Co.* v. *Young,* 219 U. S. 498, *supra,* that "through billing to destination point beyond the State is not always a necessary incident to a shipment in interstate commerce."

In disposing of the Worthington case, this Court, speaking by Mr. Justice Day, noting in passing that the coal there in question was shipped from Ohio to Huron or Cleveland where the complainant had large dock facilities and expensive machinery and appliances for unloading coal into vessels, consigned to the owner or operator or some office employee, and

> "(p. 107) that when the coal leaves the mines it is not known in what vessel it will be loaded nor to what particular ultimate destination it will go, and that sometimes such coal is sold and vessels arranged for after the coal is at Huron, * * *; (that
>
> "All coal thus loaded in vessels is, and must practically be, carried to points in other States—or to Canada,"

in disposing of the matter said:

> "(p. 108) It is true that the shipper transports the coal ordinarily upon bills of lading to himself, * * * at Huron on Lake Erie (in Ohio). The so-called 'lake-cargo coal' is necessarily shipped beyond Huron. If it stops there, another and higher rate applies. Practically all of it is put in vessels for carriage beyond the State, usually to upper lake ports, and then and only then the seventy-cent rate fixed by the Commission applies. * * *

> The situation then comes to this, that the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels and thence carried to upper lake ports beyond the State. By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be * * * (p. 109) from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage."

Citing *Southern Pacific Terminal Company* v. *I. C. Commission and Young,* 219 U. S. 498, the Court quoted somewhat at length from the opinion in that case concluding as follows:

> "(p. 110) It is contended that this transportation of the coal under the rate fixed by the (State) Railroad Commission is not within the power and authority of the Interstate Commerce Commission under paragraph 1 of the Act to Regulate Commerce, which makes the provisions of the act inapplicable to the transportation of property wholly within one State, and not shipped to or from a foreign country from or to a State or Territory; and, furthermore, that a transportation (p. 111) of the character here in question is only within the jurisdiction of the Interstate Commerce Commission when it is a transportation partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; and therefore that the subject-matter in question is left within the state jurisdiction. * * * It is enough to now hold, as we do, that the establishing of the rate in question is an attempt to regulate interstate commerce

> and is therefore beyond the power of the State or a commission assuming to act under its authority.
> * * *

Paraphrasing the conclusion so expressed it would seem from the unquestioned facts that the plan of the shipper to effect the through movement in commerce of its coal from mines in Pennsylvania destined for sale at Ohio consuming points, by an unified system of water and rail facilities wholly shipper owned or controlled and through such a system composed of both privately owned and common carrier facilities equipped for such tranpsortation, at other than Interstate Commerce rates cannot lawfully be accomplished.

If the movement of the traffic from origin to destination be in fact between States, and be both through and as continuous as the facilities afforded will permit or as the whim of the shipper and its appreciation of market conditions indicate to be desirable, such movement is one in interstate as opposed to intrastate commerce. That the initial movement from mines or the delivering movement at destination market or to consignees may be effected in part by facilities owned by the shipper is but incidental with respect to an entire movement which in part necessarily must rely upon common carrier facilities which through stock control or other ownership are dominated in action by said shipper.

While not so stated in the opinions cited it may readily be assumed from the known facts attending the trade that much of the coal movement beyond Huron and Cleveland to the upper lake destinations considered in the *Worthington* case *supra* was effected in non common carrier operated bottoms, and an examination of the transcript of the record in *United States* v. *Erie R. R. Co.*, 280 U. S. 98, on file in this Court shows that much of the inbound movement from

origins to Hoboken, N. J. for delivery at Garfield, N. J. beyond, was effected by carriers not subject to the Interstate Commerce Commission, but despite attempts to camouflage its true character by local billings from Hoboken to Garfield, both in New Jersey, and despite the fact that title to the shipment did not pass until arrangements had been fully made at Hoboken dock for the shipment of the particular lot to Garfield, it was held that that movement was but part and parcel of foreign commerce, and the essential nature of the shipment was unaffected by circumstances of changing title or local billings or of incidental detentions of convenience at intervening points, the continuing intent from beginning to end contemplating Garfield as final destination.

In the instant case the proof is ample and undisputed that the Pittsburgh Coal Company ardently desired consumption of output of its mines in Pennsylvania by the great industries clustered about Youngstown in Ohio, and that its continuing intent throughout the movement of the shipments of coal here involved was to effect and to accomplish that end with the least expense to itself and regardless of the bearing of Federal laws and Federal regulatory authority.

In *Baer Brothers* v. *Denver & R. G. R. Co.*, 233 U. S. 479, 490, the Court considered a transportation movement from Pueblo, Colorado, to Leadville, Colorado, which was part of a prior continuous movement from St. Louis, Missouri. It was held that the transportation performed between Colorado points was part of the interstate through movement, the court saying:

> "But while there was no through-rate and no through-route there was in fact, a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating

> the rate into its component parts and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation."

Nor does the fact in instant case that the coal is washed and sized at Brush Run break the continuity of the interstate movement. In *State* v. *Engle,* 34 N. J. L. 425, cited with approval in *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366, coal mined in Pennsylvania was shipped by cars to Elizabethport, N. J., to be thence shipped by water to other markets for the purpose of sale. At Elizabethport on tidewater the coal was deposited and separated according to its different sizes, and when a cargo of one size was obtained it was shipped to points in other States as soon as a vessel could be chartered to carry it, no coal being sold for consumption at Elizabethport. The Court said:

> "The power of the state to tax the subjects of commerce, where their transit for the purposes of commerce has ceased, and they have become incorporated and mixed up with the mass of property in the community, is well settled. But that a tax on property belonging to a citizen of another state, in its transit to market in other states, which is delayed within this state, not for the purpose of sale, but merely for separation and assortment for the convenience of shipping to its destination, is a tax on commerce among the states, is too plain to require argument.
>
> "Delay within the state, which is no longer than is necessary for the convenience of trans-shipment for its transportation to its destination, will not make it property within the state for the purpose of taxation."

How much stronger is the instant case where the interruption at Brush Run was not for the purpose of procuring a purchaser but solely for the purpose of transferring from cars for washing and sizing.

To like effect is the ruling of this Court in *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, where it is said at page 126—

> "The determining circumstances is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national control of foreign commerce from points in the interior of a State. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign."

An interesting case, adding both point and authority to this line of argument is *Kirkmeyer* v. *Kansas*, 236 U. S. 568, where a purveyor of liquors "in open and persistent violation of law and thereby committing a nuisance", identified with Leavenworth, Kansas, for reasons transferred his business to Stillings, in Missouri, just across the river from the former.

Business continued as theretofore with exception that on telephone orders deliveries were made from Stillings, Missouri, in Leavenworth, Kansas, across the State line, by means of his own horse-drawn wagons.

Holding that traffic in a recognized article of trade so conducted constituted interstate commerce, the regulation of which had been committed to the Congress, this Court said, page 572, that:

> "The right to send it (beer) from one State to another and the act of doing so are interstate commerce

> the regulation whereof has been committed to Congress; a State law which denies such right or substantially interferes with or hampers the same is in conflict with the Constitution of the United States. * * * (Citing cases.)
>
> "The foregoing cases and those cited therein we also regard as controlling authority in support of the claim that the business carried on by plaintiff in error (Kirkmeyer) within the State of Kansas was interstate commerce. That the traffic moved by horse-drawn wagons from a point near the state line, instead of by railroad from a greater distance, does not change the applicable rule. Nor did the mere adoption of cumbersome and expensive methods render the business intrastate—that must be tested by the actual transactions."

Another matter for consideration is the effect or importance of the control by the Pittsburgh Coal Company through stock ownership of the Lisbon and the Suburban, and ownership of the line from Smith's Ferry, Pennsylvania, to Negley, Ohio. This unified control and operation are important facts to appellants, who successfully opposed the application of the Lisbon to construct the proposed line from Smith's Ferry to Youngstown. These facts take on added importance if by the mere failure to incorporate the line from Smith's Ferry, Pennsylvania, to Negley, Ohio, as a railroad or the unwillingness of the Coal Company to consider it as it was originally proposed to be, an extension of the Lisbon, the purpose originally denied to the proprietary interest is nevertheless to be accomplished and the order of the Interstate Commerce Commission held for naught. Certainly the Interstate Commerce Act is in vain if commerce originally contemplated as interstate may become intrastate by any such subterfuge, and thus be removed in all of its aspects from the jurisdiction of the body created to regulate it.

THE LISBON RAILROAD IDENTIFIED THE TRAFFIC AS INTERSTATE COMMERCE IN REFUSING TO SUBJECT IT TO DEMURRAGE CHARGES AT THE BRUSH RUN WASHER AT NEGLEY, OHIO.

More than 48 hours elapsed from the time the four cars were placed empty on the track of the Pittsburgh Coal Company at Brush Run until they were offered under load to the Lisbon. The "free time" for loading is 48 hours and beyond that free time railroad demurrage charges are applicable under a tariff filed with both the Interstate Commerce Commission and the Public Utilities Commission except that no demurrage charges apply on cars held at * * * "washers * * * located at or adjacent to the mines producing the coal to be washed * * * and such cars under load with such commodities at such * * * coal washers * * *." The President of the Lisbon testified before the Ohio Commission that under the exception quoted, demurrage charges were not regarded as applicable and therefore were not assessed. In so applying the exception, the Lisbon necessarily did these two things:

(a) Regarded the washer at Brush Run, Ohio, as adjacent to the mines in Pennsylvania which produced the coal;

((b) Definitely connnected the washed coal in cars at Brush Run, Ohio, with the mine of its origin in Pennsylvania.

In allowing the exemption from demurrage it is plain that the Lisbon vested the traffic with an interstate character. That this is so necessarily follows from the fact that the exemption granted is conditioned upon the establishment of a continuous relation between the washed coal in cars at the washer at Brush Run, Ohio, with the mine of its origin in Pennsylvania. Having thus regarded the coal as interstate commerce for purposes of the demurrage schedule, it is clear that the same coal in the same cars

from the same washer to final destination could not be regarded by the Lisbon as intrastate commerce in applying transportation charges. To hold otherwise is to argue the untenable proposition that at one and the same time given shipments may be regarded as intrastate commerce for purposes of one railroad schedule and interstate commerce for purposes of another.

THE DISTRICT COURT MISCONCEIVED AND MISAPPLIED DECISIONS OF THIS COURT IN OTHER CASES TO THE FACTS IN THE INSTANT CASE.

In holding that the transportation involved, although interstate, was not commerce subject to the jurisdiction of the Interstate Commerce Commission and that therefore the State authorities were free to exercise control over that part of the carriage in Ohio performed by common carriers, the District Court cited decisions of this Court in the cases of *Santa Fe, Prescott & Phoenix Ry. Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177; *The Pipe Line Cases*, 234 U. S. 548; *Atlantic Coast Line R. R.* v. *Standard Oil Co.*, 275 U. S. 257, in support of its conclusions.

The reasoning and manner of application of those decisions by the lower court is not made clear in its brief memorandum opinion, but an examination of those cases, we think, will show that the District Court misunderstood the legal effect of the decisions therein and incorrectly applied them to the dissimilar factual situation presented in the case at bar.

The first cited case (*Santa Fe, etc., Ry. Co.* v. *Grant Brothers*, 228 U. S. 177) involved only the question of the right of a railroad company to exempt itself from liability for its own negligence when acting, not in the capacity of a common carrier, but merely as a contracting party to an agreement for the construction and improvement of its

road. There was no question of interstate commerce involved in that case, the contractor's services as well as the carriage of its men and supplies having been performed wholly within the State of Arizona. This Court said at page 188 of its opinion in that case:

> "It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions."

It plainly appears therefore that there is not the remotest analogy between the *Grant Brothers* case and the case at bar. The fact that a railroad company transporting materials for the construction of its own road was held to be "not acting in the performance of its duty as a common carrier" and the movement not subject to published tariffs, clearly affords no basis for the conclusion in the case at bar that continuous transportation from one State to another performed by an unified system of transportation under single operating control was similarly "outside the policy" of the provisions of the Interstate Commerce Act.

In *The Pipe Line Cases*, 234 U. S. 548, the following language appears at pages 561-562 of the court's opinion:

> "There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the

> sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end."

The factual situation here is entirely different. The coal does not move from Pennsylvania as "merely an incident to use" by the Pittsburgh Coal Company at Brush Run, Ohio. The continuous interstate movement from Pennsylvania is performed for the sole and continuing purpose of placing the coal in the hands of the ultimate consumer at Youngstown, Ohio. The commodity moves into Brush Run, Ohio, as coal, and, after an interruption of insignificant duration, moves out of that point as coal subject to transportation rates applicable on coal. In the cited case, the owner but moved the crude oil from point of production, not for barter nor in the course of trade, to its refineries for manufacture where its identity and commercial characteristics were completely changed and converted into various products which when they left the refinery in the course of trade moved under different transportation rates from oil.

In the *Standard Oil Company* case (275 U. S. 257), the plaintiff maintained at Port Tampa, Tampa and Jacksonville extensive facilities for receiving and storing gasoline, refined oil, lubricating oil and fuel oil, all of which were obtained from Louisiana or Mexico and brought by steamer into Port Tampa and Jacksonville. The commodities in question were pumped from the ships through plaintiff's pipe lines, either directly into plaintiff's storage tanks or into tank cars, in which the oil was moved by rail to its

other storage tanks a few miles distant, and deposited therein. Title passed to the plaintiff on delivery, and settlements with its vendors were made on the basis of the amounts so actually delivered by them, at market prices or at prices fixed in advance in yearly contracts calling for delivery of specified quantities each month. In the arrangements with the vendors, none of the oil brought in was designated or intended for any destination in Florida beyond the storage tanks or tank cars into which it was delivered from the ships, and there was neither necessity nor purpose to send any of it through the storage stations to interior points by intermediate continuity of movement, although delivery into storage tanks might occur contemporaneously with withdrawal of oil from the same tanks for the purpose of supplying plaintiff's bulk and service stations, and although sales of fuel oil to customers were largely contracted for by plaintiff in advance of shipment of such oil to plaintiff from point of origin.

The question was whether rail transportation of the oil from the storage tanks to plaintiff's customers in Florida, or to plaintiff's bulk and service stations therein from which it was sold to such customers, was State or interstate commerce. In its opinion, this Court pointed out (p. 264) that the plaintiff paid local taxes to the State of Florida on all of its products on hand in storage tanks, that plaintiff (p. 266) had been conducting its business in the manner stated for many years, and it was not adopted for the purpose of evading the payment of interstate rates, and its business could not be conducted without the storage facilities described. In holding that the transportation involved was intrastate and subject to intrastate rates, this Court said (pp. 267-270):

> "It seems very clear to us on a broad view of the facts that the interstate or foreign commerce in all this oil ends upon its delivery to the plaintiff into the

storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars, bulk stations and drive-in stations, or directly by tank wagons to customers, is all intrastate commerce. This distribution is the whole business of the plaintiff in Florida. There is no destination intended and arranged for with the ship carriers in Florida at any point beyond the deliveries from the vessels to the storage tanks or tank cars of the plaintiff. There is no designation of any particular oil for any particular place within Florida beyond the storage receptacles or storage tank cars into which the oil is first delivered by the ships. The title to the oil in bulk passes to the plaintiff as it is thus delivered. When the oil reaches these storage places along the Florida seaboard, it is within the control and ownership of the plaintiff for use for its particular purposes in Florida. The plaintiff is free to distribute the oil according to the demands of its business, and it arranges its storage capacity to meet the future variation in its business needs at Tampa, Port Tampa, or Jacksonville or St. Johns River Terminal.

The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having an independent or intrastate character, even though it be in the same cars. *Chicago, M. & St. P. Ry. Co.* v. *Iowa,* 233 U. S. 334. The change from rail to ship has often been held consistent with a continuity of interstate or foreign commerce, even though there may be only local billing. *Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111; *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.,* 229 U. S. 336; *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande Railroad Co.,* 233 U. S. 479. On the other

hand, in *Chicago, M. & St. P. Ry. Co.* v. *Iowa, supra,* the reshipment of an interstate shipment of coal after its arrival in the state in the same carload lots was held not inconsistent with the change from interstate to intrastate commerce. In *Baltimore & Ohio S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, 170, a shipper billed his goods from one state to another, paying the interstate freight and reshipped them to another point in the second state, intending from the first to reach the latter destination, but interrupting the transportation only to take advantage of a difference in his favor between the through rate and the sum of those paid. It was held that the essential nature of the entire movement was in interstate commerce and that the shipper must pay the only lawful rate, which was the interstate commerce rate to the final destination. These cases are illustrations to show that the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it.

The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate, and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plain-

tiff company at Tampa, Port Tampa, Jacksonville or the St. Johns River Terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations, is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it. Neither the sellers who deliver the oil, nor the railroad company that aids the delivery of the oil to the storage tanks and tank cars at the seaboard, has anything to do with determining what the ultimate destination of the oil is, or has any interest in it, or has any duty to discharge in respect to it, except that the railroad company, after the storage in Florida has been established for the purposes of the plaintiff company, accepts the duty of transporting it in Florida to the places designated by the plaintiff company.

The compensation for the transportation of the oil through the pipe lines from the steamers to the storage tanks or to the storage tank cars, and the transportation of those cars to the seaboard storage tanks of the plaintiff, is not here in question, and we are not asked to determine whether such deliveries to the storage tanks and cars on the seaboard from the steamers are interstate or foreign commerce.

We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate."

From the foregoing description of the case and the language quoted, it is obvious that there is no parallel between the facts in that case and those in the case at bar. There is no storage of coal at the Brush Run cleaning plant nor distribution from that point. The intended destination of the coal here in question was known even before it arrived at the barge unloading facilities at Smith's ferry, Pennsylvania, all of the facilities employed in the transportation of this coal up to Youngstown, are owned and controlled by the Coal Company. There is, moreover, the absolute necessity that the coal be sent through the Brush

Run plant to points in Ohio "by immediate continuity of transportation." The case is unlike that cited, in the further respect that the Pittsburgh Coal Company has only recently began conducting its business in the manner stated, and we thing the conclusion is unescapable that in this instance "it was adopted for the purpose of evading the payment of interstate rates." The facts in this case are more nearly analogous to those considered in *Railroad Commission of Ohio* v. *Worthington,* 225 U. S. 101, and *Erie Railroad Co.* v. *United States,* 280 U. S. 98.

In Conclusion.

Upon the strength of the evidence adduced on the trial before the District Court, all of which emenated from witnesses sworn on behalf of the appellees here and none of which has been sought to be controverted, it is respectfully submitted that the coal with which we are here concerned was mined in Pennsylvania from mines owned and operated by the Pittsburgh Coal Company, for the purpose of transportation and sale to consuming industries located at and in the vicinity of Youngstown in the State of Ohio; that it was moved from mines in Pennsylvania to Y and S—Pennsylvania interchange in Ohio by water and rail facilities dominated from origins to said point of interchange by the Pittsburgh Coal Company, which was also the producing owner and the shipper of the freight; that from the beginning of the transportation movement the coals were destined for delivery and consumption in the Youngstown market; that even if not sold before transportation started they were at all times open to sale and purchase and sale actually was effected at some point between Risher in Pennsylvania and Bush Run in Ohio; that the essential character of the transportation movement from beginning to intended destination was interstate, and that character was not altered or in any manner restricted by its separa-

tion into component segments and the application of local intrastate billings thereto; that the very evident purpose on part of the Pittsburg Coal Company as both owner and shipper of the freight to circumvent both applicable provisions of the Interstate Commerce Act and the specific denial of a certificate of convenience and necessity by the Interstate Commerce Commission invites condemnation on part of this Court and justly compels reversal of the decree of the District Court and remand of the cause with an instruction to enjoin and restrain enforcement of the order of March 26, 1935, of Public Utilities Commission of Ohio, as prayed by appellant's bill.

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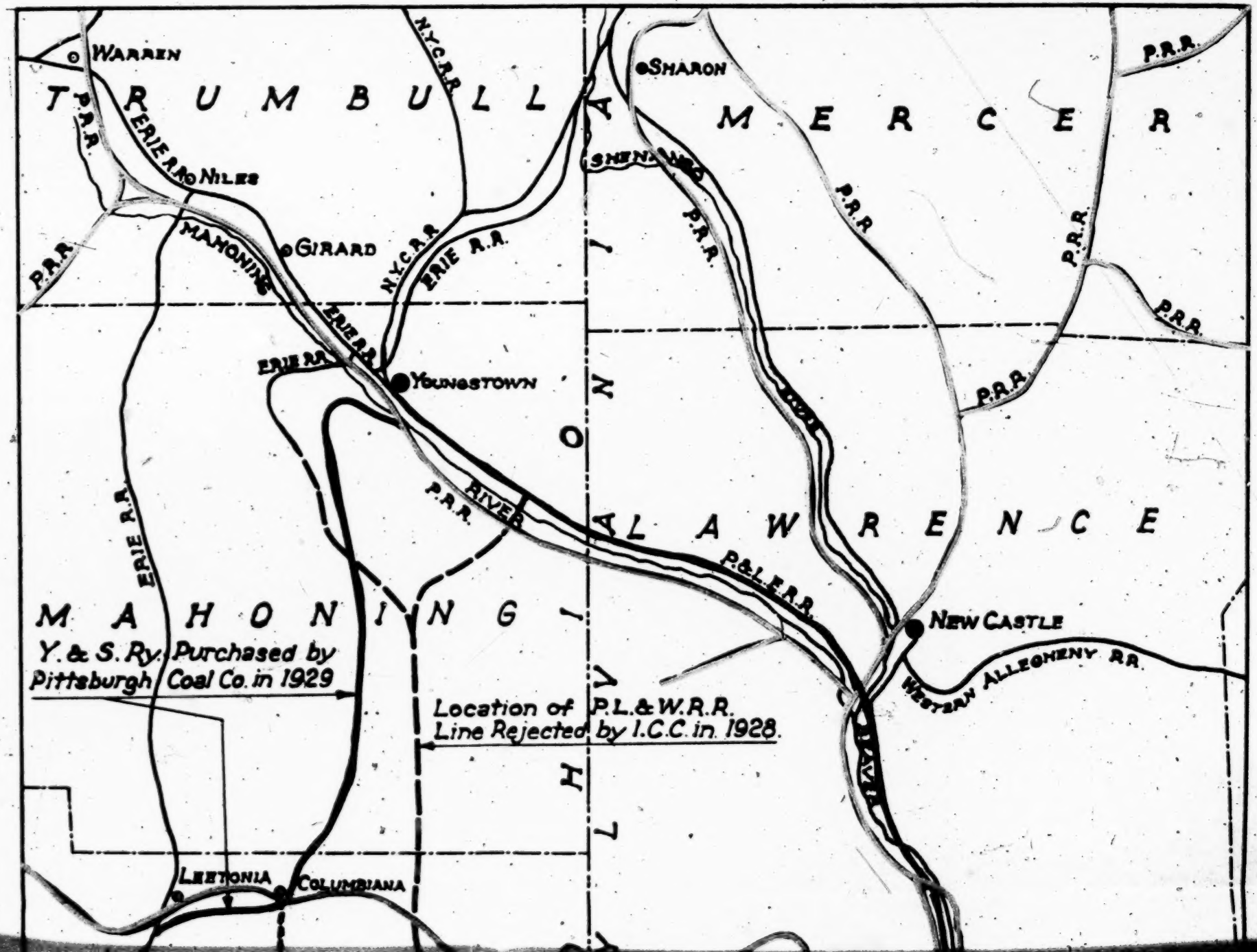
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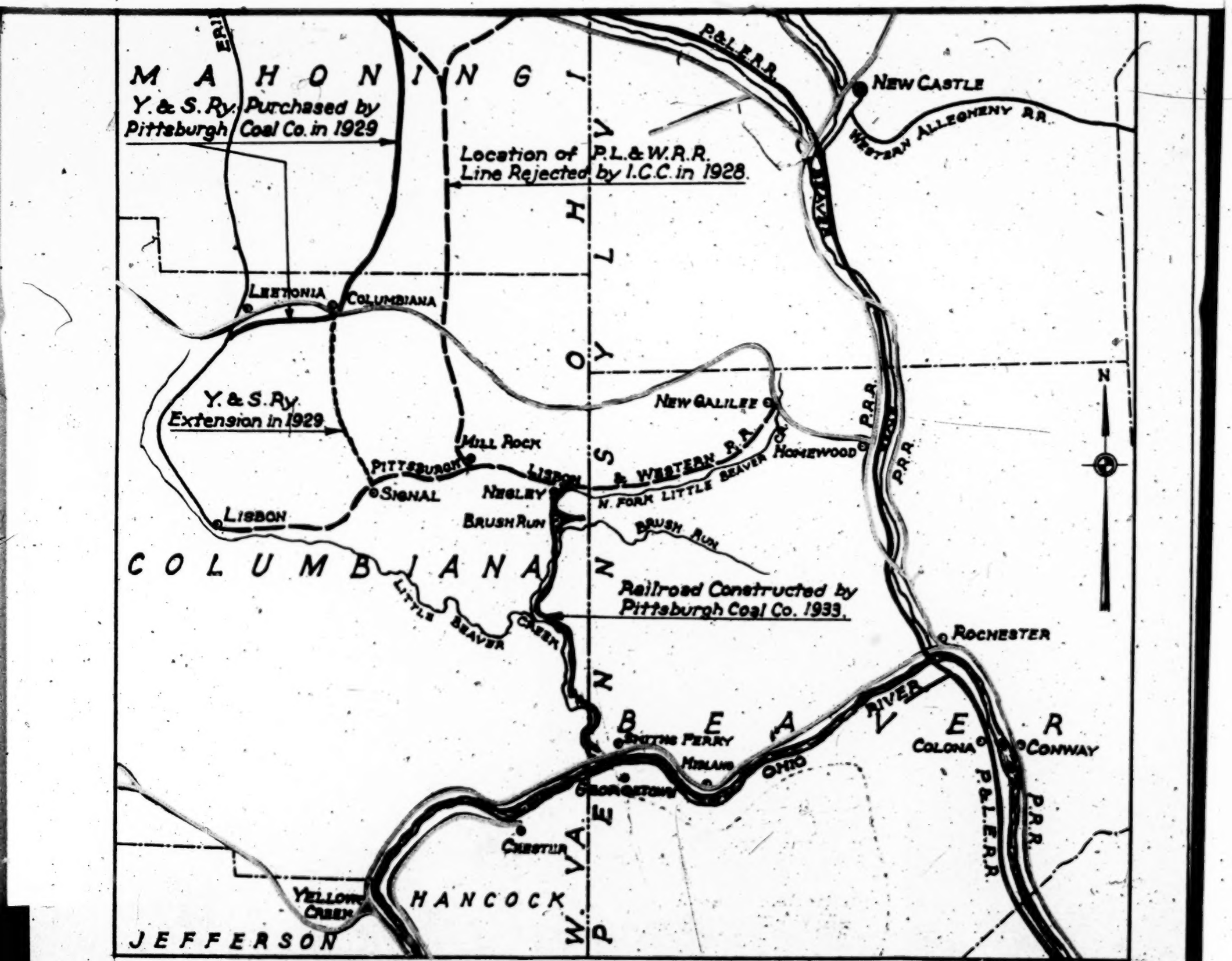
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ERIE
LEETONIA
COLUMBIANA
Y. & S. Ry. Extension in 1929
NEW GALILEE
P.R.R.
MILL ROCK
PITTSBURGH & WESTERN R.R.
HOMEWOOD
PITTSBURGH
LISBON
SIGNAL
NEGLEY
N. FORK LITTLE BEAVER
LISBON
BRUSH RUN
BRUSH RUN
COLUMBIANA
Railroad Constructed by Pittsburgh Coal Co. 1933.
LITTLE BEAVER CREEK
ROCHESTER
BEAVER RIVER
SMITHS FERRY
MIDLAND
OHIO
GEORGETOWN
COLONA
CONWAY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 746.

THE PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, and THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, *Appellants*,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, Attorney General of the State of Ohio, and PITTSBURGH COAL COMPANY, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE OHIO APPELLEES.

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April 3, 1936.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
STATEMENT	1
a. The Issue	2
b. The Proceedings before the Ohio Commission.	5
c. The Proceedings before the District Court	7
d. Prior Proceedings in this Court	8
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. There was substantial evidence before the Ohio Commission, none of which was in any wise controverted, to support every finding of fact made by the Commission in the report upon which its order is based	12
II. Common carrier transportation of a prepared product which is wholly intrastate in *locus* does not become interstate in character merely because the raw commodity from which the prepared product was processed had previously been moved from another state by non-common carrier facilities with an intent to market the prepared product in the second state	18
III. The order of the Ohio Commission was a lawful and proper regulation of Ohio state commerce	18
IV. The order of the Ohio Commission, insofar as it requires the appellants in the future to transport, switch and deliver as Ohio state commerce, other carloads of bituminous coal transported into Youngstown under circumstances and conditions like those surrounding the transportation of the four carloads herein directly involved, is not unlawful because vague and uncertain	33

Page

V. The District Court did not err in decreeing that the bill of complaint should be dismissed at complainants' costs 36

REPLY TO APPELLANTS' OPENING BRIEF... 37

REPLY TO APPELLANTS' OPENING STATEMENTS 40

Findings of Fact and Conclusions of Law..... 40
Rates from Pennsylvania Mines to Ohio Destinations 41
The Statute 41
The switching rates in Youngstown 41
Proceedings before the District Court..... 43

REPLY TO APPELLANTS' ARGUMENT..... 43

VI. The Southern Pacific Terminal case and other cases relied upon by the appellants are not here in point, and not at all controlling..... 45

VII. Common carrier transportation of a prepared product in intrastate commerce does not lose its intrastate character and become interstate commerce because the raw commodity from which the prepared product was processed, was intended while in the course of its movement into the state by the private facilities of the owner, to be processed and then sold in that state 50

VIII. The state or interstate character of the commerce in the transportation of this coal from Negley to Youngstown does not depend upon the assessment or non-assessment of demurrage for the detention of empty or loaded cars at the Negley plant 55

CONCLUSION 59

Appendix 60
Ohio General Code, Section 503 60
Pennsylvania Public Service Company Law, No. 854, Art. 1, Sec. 1 60
Interstate Commerce Act, Part I, Sec. 1 (1)..... 60

Page

Interstate Commerce Act, Part I, Sec. 1 (3)..... 61
Interstate Commerce Act, Part I, Sec. 1 (8)..... 61
Interstate Commerce Act, Part I, Sec. 1 (9)..... 62
Interstate Commerce Act, Part I, Sec. 1 (18-(22).. 62
Interstate Commerce Act, Part I, Sec. 6 (1)..... 65
Interstate Commerce Act, Part II, Sec. 203 (14)... 65
Interstate Commerce Act, Part II, Sec. 203 (15)... 66
Interstate Commerce Act, Part II, Sec. 203 (16)... 66
Interstate Commerce Act, Part II, Sec. 203 (17)... 66

CASES CITED

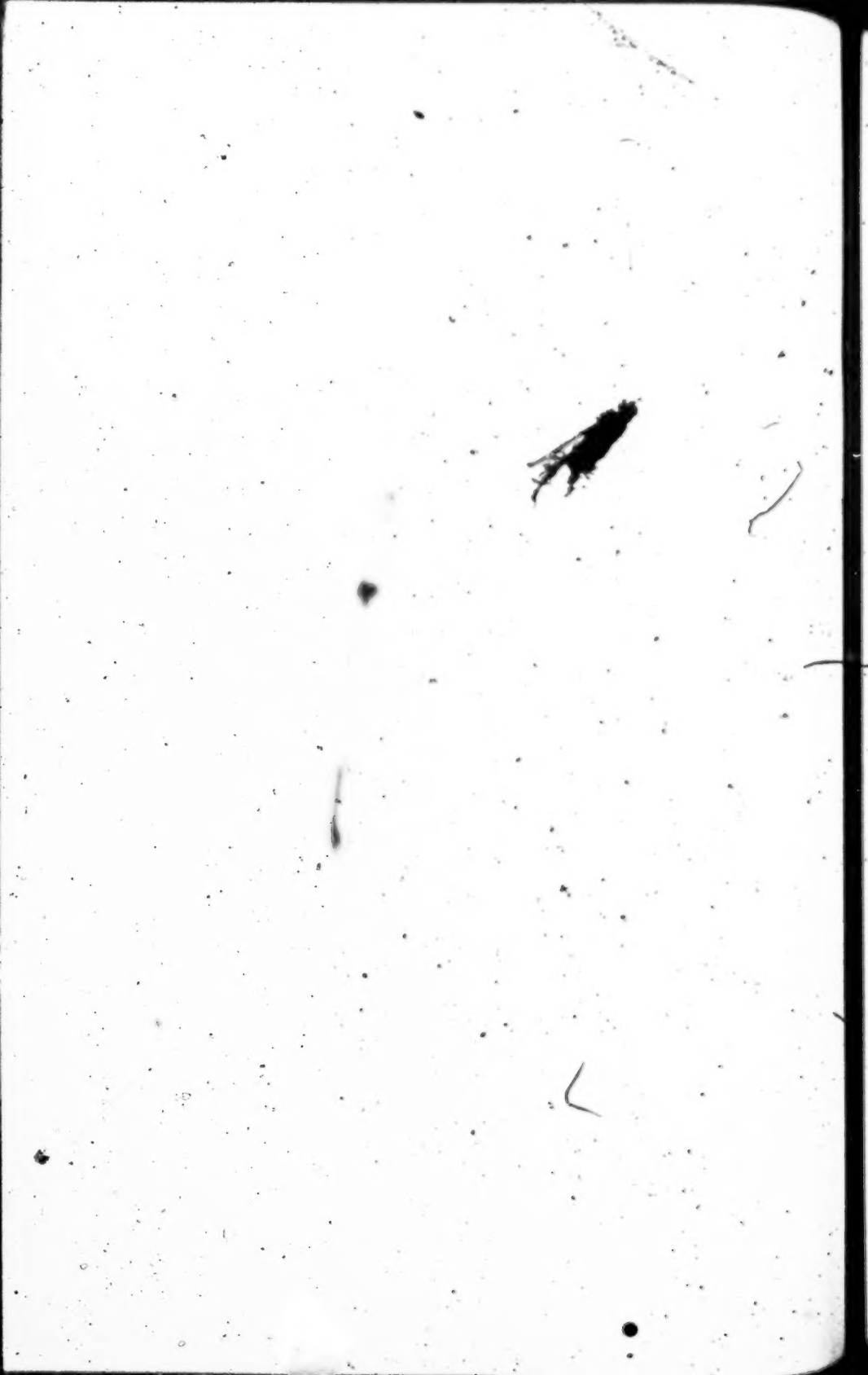
The Akron, Canton & Youngstown Ry. Co. et al. v. The Public Utilities Commission of Ohio, 96 O. S., 359 14
Arkadelphia Milling Co. v. St. L. S. W. R. Co., 249 U. S. 134 54
Atlantic Coast Line R. Co. v. Standard Oil Co., (Florida Oil case) 275 U. S. 257.....24, 25, 29, 30, 33, 50, 52
Baer Bros. Mercantile Co. v. Denver & R. G. R. Co., 233 U. S. 479 50
Baltimore & O. S. W. R. Co. v. Settle, 260 U. S. 166.... 49
Baltimore & Ohio Rd. Co. et al. v. Public Utilities Commission, 130 O. S. 258, 8 Ohio Bar 38 43
Baltic Min. Co. v. Massachusetts, 231 U. S. 68 20
Campbell River Mills, Ltd. v. Chicago, Milwaukee & St. Paul Ry. Co., dismissed by I. C. C. without report 27
Champlain Realty Co. v. Brattleboro, 260 U. S. 366.... 50
Chicago, M. St. P. & P. R. Co. v. Campbell River Mills Co., 42 F. (2d) 775; 53 F. (2d) 69; certiorari denied, 285 U. S. 536.....1, 19, 26, 30, 53, 54
Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission (Social Circle case), 162 U. S. 184.... 50
City of Findlay v. P. U. C., 111 O. S. 827 14
Cleveland, C. C. & St. L. R. Co v. United States, 275 U. S. 408 49
Coe v. Errol, 116 U. S. 517 .....37, 49
Crowley v. Atchison, T. & S. F. Ry. Co., 206 I. C. C. 221 32
Eager, Jr. v. Public Utilities Commission, 113 O. S. 604 14
Florida v. United States, 292 U. S. 1 .....14, 15
M. D. Friedman Co. v. C. & O. Ry. Co., 194 I. C. C. 455 .....30, 53

Page

Granville & Newark Motor Service Inc. v. Public Utilities Commission of Ohio, 119 O. S. 148 15
The Hocking Valley Railway Co. v. The Public Utilities Commission, 100 O. S. 321 14
The Hardin-Wyandot Lighting Co. v. The Public Utilities Commission, 108 O. S. 207 14
Kirmeyer v. Kansas, 236 U. S. 568 50
The Lima Telephone & Telegraph Co. v. The Public Utilities Commission of Ohio, et al., 98 O. S. 110 14
Lykins v. Public Utilities Commission of Ohio, 115 O. S. 376 15
McCluskey v. Marysville & N. R. Co., 242 U. S. 36 ....23, 52
National Mortar and Supply Co. v. The Pennsylvania Railroad Co. et al., Ohio P. U. C. Rep. 1929, p. 79 33
New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21 36
The Ohio Utilities Co. v. The Public Utilities Commission, 108 O. S. 143 14
Pennsylvania R. Co. v. Clark Bros. C. M. Co., 238 U. S. 456 49
The Pennsylvania Railroad Co., et al. v. The Public Utilities Commission of Ohio, et al., U. S. Dist. Court, N. D. of Ohio, Eastern Division, dec. Dec. 11, 1935, not yet reported 8
Pollitz et al. v. The Public Utilities Commission of Ohio, 96 O. S. 560 14
Procter & Gamble Co. v. United States, 225 U. S. 282 56
Railroad Commission v. Worthington, 225 U. S. 101.. 50
Railroad Commission v. Texas & P. R. Co., 229 U. S. 336 50
Re Railroad-Telegraph Cos., 12 I. C. C. 10 .....21, 28
Santa Fe, P. & P. R. Co. v. Grant Bros. Constr. Co., 228 U. S. 177 .....20, 30, 31
Settle et al., Partners v. The Public Utilities Commission of Ohio, 94 O. S. 417 14
Solt et al. v. Public Utilities Commission of Ohio, et al., 114 O. S. 283 14
South Covington & C. Street R. Co. v. Covington, 235 U. S. 537 9
Southern P. Terminal Co. v. Interstate Commerce Com., 219 U. S. 498 .....45, 48, 50

Page

Switching Rates and Service at Youngstown, Ohio, I. & S. 142; The Youngstown and Suburban Railway Company v. The Baltimore and Ohio Railroad Company, No. 8833, 1935 Annual Rep., P. U. C. Ohio 43
Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111 50
United States v. Delaware, L. & W. R. Co., 238 U. S. 516 56
United States v. Erie R. Co., 280 U. S. 98 50
United States Finishing Co. v. N. Y. N. H. & H. R. R. Co., 142 I. C. C. 331 29
United States v. Lehigh Valley R. Co., 220 U. S. 257.. 56
United States v. Ohio Oil Co., (Pipe Line cases) 234 U. S. 546 .....21, 51
United States v. Reading Co., 253 U. S. 26 56
West Ohio Gas Co. v. Public Utilities Commission of Ohio, 128 O. S. 301 15
The Youngstown and Suburban Railway Co. v. The Pennsylvania R. R. Company and Erie R. R. Co., 1935 Annual Rep., P. U. C., Ohio 7



IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 746.

THE PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, and THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, *Appellants*,

v.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE OHIO APPELLEES.

Statement.

This is an appeal from a decree of a specially constituted three-judge court of the Southern District of Ohio, Eastern Division (R. 69-70), which unanimously declined to hold

unlawful a certain order of The Public Utilities Commission of Ohio (R. 41-42) attacked by the appellants here as plaintiffs below, and ordered their petition to be dismissed. (R. 70)

a. The Issue.—The case presents but one question for determination by the Court. It may be stated thus:

> Is the commerce in the common carrier transportation of four certain carloads of bituminous coal from a shipper at Negley, Ohio, via an all-Ohio route to a consignee at Youngstown, Ohio, interstate commerce, subject to regulation by the Interstate Commerce Commission, or Ohio state commerce, subject to regulation by The Public Utilities Commission of Ohio?

The appellants, basing their contention upon facts not connected with the common carrier transportation, and having reference to matters which preceded it entirely, say that the commerce from Negley to Youngstown is interstate in character and subject to regulation and control by the Interstate Commerce Commission; the appellees, resting upon the *locus* of the common carrier transportation, and contending that no preceding matters in any way overcome the presumption that the character of the common carrier transportation is determined, in the first instance, by its *locus,* say that the commerce from Negley to Youngstown is intrastate in character, and subject to regulation and control by The Public Utilities Commission of Ohio.

The question awaiting the Court's determination arises out of the following facts:

The Pittsburgh, Lisbon & Western Railroad Company, a common carrier railroad (hereinafter referred to as the Lisbon) on September 17, 1934, received from the Pittsburgh Coal Company, a shipper, at Negley, Ohio, four certain carloads of bituminous coal, with instructions in the usual documentary form (R. 99, 109, 110, 111, 192B, 200,

201, 203) to transport the same via the joint connecting route of the Lisbon and The Youngstown and Suburban Railway Company, a common carrier railroad (hereinafter referred to as the Y. & S.) to Youngstown, Ohio, where the Y. & S. was to transfer the four cars to the Pennsylvania Railroad Company for transfer by the latter to the Erie Railroad Company, for delivery by the Erie to the consignees named in the shipping orders, in Youngstown.

The point of shipment, Negley, is a local point on the Lisbon; no other common carrier railroad reaches it. (R. 95, 96) The entire route from Negley to Youngstown, via the road hauls of the Lisbon and the Y. & S., and the switching hauls of the Pennsylvania and the Erie, right to the delivery points of the consignees, lies wholly within the State of Ohio. (R. 94-98, 103-104)

The transportation service was performed by the Lisbon and the Y. & S. in accordance with the shipper's instructions, and the Y. & S. on September 19, 1934, transferred the four cars to the Pennsylvania in the usual and customary manner of everyday operation by placing them on the Y. & S.-P. R. R. interchange track, and delivering to the Pennsylvania the usual and customary written instructions concerning the further transportation. (R. 98-115, 192A-204) Thereupon the Pennsylvania, instead of proceeding with the further transportation according to such instructions, returned the four cars to the Y. & S. by placing them upon P. R. R.-Y. & S. interchange track (R. 116-118) on September 21, 1934, and presented to the Y. & S. the following notice ante-dated September 18, 1934 (R. 116):

> "Effective at once this company will not accept shipments of bituminous coal carloads from the Youngstown & Suburban Railway at its interchange in Youngstown for delivery to individuals or industries on its own or connecting lines within the switching limits of Youngstown which do not originate at mines within the state of Ohio until all charges from its connection with the Youngstown and Suburban Railway to point of ulti-

mate delivery are fully prepaid at rates published in tariffs on file with the Interstate Commerce Commission."

The Pennsylvania had never theretofore required that the Y. & S. should pay any of the Pennsylvania's charges on any such interchanged freight "in advance," so to speak; instead, all charges of both carriers on freight handled from either to the other via this interchange had customarily been paid through a regular "interchange settlement" between the two carriers. (R. 182-183) Furthermore, compliance with the Pennsylvania's notice would have required the Y. & S. to pay for the switching at the rate of $1.89 *per ton*, as explained below, p. 5.

The Y. & S., upon receipt of the notice, tendered to the Pennsylvania the amounts lawfully due the Pennsylvania and the Erie under the schedules of rates and charges on file with The Public Utilites Commission of Ohio, for the intrastate switching of the four carloads of coal, and contemporaneously replaced the four cars on the Y. & S.-P. R. R. interchange track. (R. 116-118) This tender of the Ohio intrastate switching charges the Pennsylvania refused, and it replaced the four cars on the P. R. R.-Y. & S. interchange. (R. 114-118)

Upon the determination of the question of law here presented depends, first, the amount of the charges of the Pennsylvania and the Erie for switching this coal to the consignees in Youngstown; and second, whether or not the coal will be so switched at all.

As Ohio state commerce the switching charges would be, *per car*, $2.70 for the intermediate service of the Pennsylvania, and $4.95 for the delivery service of the Erie, or a total of $7.65 *per car*. (R. 116-117) These are the usual and normal charges for these particular switching movements in either state or interstate commerce on all commodities, *except coal, coke, iron ore and fluxing stone when*

moving in interstate commerce, from the Y. & S. to consignees on other lines in Youngstown. (R. 182)

As interstate commerce the switching charges would be, *per ton*, 76 cents for the intermediate service of the Pennsylvania, and $1.13 for the delivery service of the Erie, or a total of $1.89 *per ton*, equivalent to $94.50 for the standard car of 50 tons of bituminous coal. These are not switching rates at all, for none such are published by these trunk lines on such traffic. In lieu thereof, the switching charges are computed at the road-haul rates from Youngstown to the next destination beyond, in the direction of the switching movement. (R. 11-12, 181)

The maintenance of the rates in this fashion by the trunk lines is deliberate, and is part of a determination on their part not to switch to consignees on their lines in Youngstown, coal so brought into the city by the Y. & S. This the trunk lines admitted in another proceeding before the Ohio Commission pending there contemporaneously with this, and involving the lawfulness of the intrastate switching rates. (See *Post*, pp. 42-43.)

b. The Proceedings before the Ohio Commission.—Facing the situation just described, the Y. & S. as a carrier in possession of the four cars under the obligation of the bill-of-lading contract, filed with the Ohio Commission on September 29, 1934, its complaint against the Pennsylvania and the Erie. (R. 71) It charged that those defendants had "failed, omitted and neglected, and threaten to continue to fail, omit and neglect, without unreasonable delay to transfer, switch and deliver cars of bituminous coal, destined to a point on said Erie Railroad Company as a connecting line beyond said the Pennsylvania Railroad Company, in Ohio intrastate commerce," in violation of the General Code of Ohio. (R. 78) The relief prayed for was an order commanding the defendants "without unreasonable delay or discrimination to transfer, switch and deliver the four above-described carloads of bituminous coal and any other

carloads of bituminous coal likewise loaded, shipped and billed." (R. 79)

The Pennsylvania and the Erie answered individually, denying all the material allegations of the complaint (R. 79). There followed the usual hearing, promptly had on October 17-18, 1934, at which time the other Youngstown lines,—The Baltimore & Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburgh & Lake Erie Railroad Company, and The New York Central Railroad Company,—appeared and intervened (R. 82). These interveners participated actively in the hearing, their counsel participated with defendants' counsel in cross-examining witnesses at length, and they joined with the named defendants in motions to dismiss the complaint upon jurisdictional grounds. (R. 184) The various named and intervening defendants will be jointly referred to herein as the trunk lines.

Upon this hearing evidence in support of the allegations of fact recited in the complaint before the Commission was introduced through the president of the Y. & S. (R. 93 *et seq.*) Additional evidence with respect to the operation of the coal company which shipped the coal from Negley, was given by its president at the invitation of the presiding commissioner. (R. 93, 144 *et seq.*) No witnesses were presented by the trunk lines, who took the position that, because the evidence submitted by the president of the coal company was a "very precise statement" (R. 155), and "explained all the facts as we understood them and as we intended to show them by secondary evidence" (R. 185) they had come to the conclusion that any evidence that they might offer would be "merely cumulative evidence." (R. 185) Accordingly, they announced that "the defendants and interveners therefore will rest upon the record as it is and upon our motion as just made." (R. 185) The motion was the one already mentioned, to dismiss the complaint on jurisdictional grounds, and was taken under advisement by the presiding commissioner. (R. 184-185)

The matter being thereafter submitted, the Commission on March 26, 1935, made its report and issued its order, originally scheduled to become effective on April 10, 1935. (R. 8, 41)[1] A petition for rehearing, filed by the trunk lines was denied by the Commission on April 8, 1935. The effective date of the order was extended from time to time, pending the determination of the subsequent proceedings in the District Court, until January 2, 1936. (R. 220)

It is this order of the Commission, dated March 26, 1935, which raises the question already stated (*ante*, p. 2), for decision by this Court.

c. The proceedings before the District Court.—Promptly after the denial by the Ohio Commission of reconsideration of its report and order, the trunk lines filed with the United States District Court for the Southern District of Ohio, Eastern Division, their Petition to Enjoin, etc., the order of the Commission. (R. 1)

The petition alleged that the trunk lines had been denied a fair and impartial hearing before the Commission (R. 6); that the Commission's order was not supported by proper and adequate findings (R. 6); that there was no substantial evidence before the Commission (R. 6); that the findings and order were against the manifest weight of the evidence and the overwhelming preponderance of the evidence (R. 6); that the Commission acted unreasonably and arbitrarily (R. 6); that the effect of the order of the Commission is to regulate and impose a burden upon interstate commerce (R. 5, 6); and that the order deprived the complainants of due process and equal protection of the law. (R. 6) It asked for interlocutory and permanent injunctive relief. (R. 7-8)

As will be observed from a comparison of the bill below and the assignments of error now filed, most of these contentions have been abandoned. In substance, the trunk

[1] The Youngstown and Suburban Railway, Complainant, v. The Pennsylvania Railroad Company and Erie Railroad Company, 1935 Annual Rep., P. U. C., Ohio.

lines come into this Court resting upon two propositions, first, that there was no substantial evidence before the Ohio Commission, and, second that the action of the Ohio Commission constitutes a regulation of interstate commerce. (R. 221-222, 229-231)

The District Court organized as required by statute with three judges, one a circuit judge, on December 11, 1935, handed down its decree sustaining the order of the Commission, denying the relief sought, and ordering the bill dismissed. (R. 69)[1] The two paragraph opinion embodied in the decree (R. 69-70) is short and to the point. The District Court supports the order of the Commission in all respects and agrees with the Commission in its understanding of the decisions of this Court which are pertinent to the issues here, and which likewise support the order of the Commission. (R. 69-70)

It may be observed that the appellants in their Statement as to Jurisdiction of this Court, recite that the decree below "was passed and entered March 11th, 1935." That date is an error. The judgment of the District Court was actually entered, as aforesaid, on December 11, 1935. (R. 69)

d. Prior Proceedings in this Court.—On December 31, 1935, the appellant trunk lines presented to a single judge of this Court their petition (R. 218), not theretofore served upon or brought to the notice of the appellees or any of them, which sought to maintain the *status quo* pending review by this Court of the action of the District Court, by staying the order of the Ohio Commission, which otherwise would have become effective on January 2, 1936. (R. 220) On December 31, 1935, an order was issued by Mr. Justice McReynolds staying the order of the Ohio Commission pending the prosecution of this appeal. (R. 220) This order, although telegraphic notice thereof was given by

[1] The Pennsylvania Railroad Co., et al., Complainants, v. The Public Utilities Commission of Ohio, et al., Defendants, decided Dec. 11, 1935, not yet reported.

the clerk on December 31, 1935, did not come to the attention of the appellees or any of them until January 2, 1936. The Y. & S., relying upon the order of the Ohio Commission, replaced the four cars in question on the Y. & S.-P. R. R. interchange track on the morning of January 2, 1936. Presumably because of the stay thus issued, the four cars were then again refused by the Pennsylvania and replaced by it on the P. R. R.-Y. & S. interchange. They now remain in the physical possession of the Y. & S.

Summary of Argument.

The real question presented for the Court's determination is the character of the commerce involved in the transportation from Negley to Youngstown,—is it Ohio intrastate commerce as its *locus* indicates, and as the Commission and the District Court both concluded, or is it interstate commerce?

Appellants contend that the transportation is in interstate commerce, because the coal involved was actually mined in the State of Pennsylvania and was transported into Ohio "pursuant to a continuing purpose and intent" on the part of the shipper and owner to sell or otherwise commercially dispose of it there or at destinations beyond.

The Commission found that the movement from the mine in Pennsylvania was of raw run-of-mine coal, owned throughout that movement by the mine operator, and moved by him in his privately owned facilities, to his own preparation plant at Negley; that there was no dealing in or with respect to the coal in the course of that private movement; that the private movement was not through and continuous; and that there was no commerce in the coal in the course of that private movement. It further found that the common carrier transportation from Negley to Youngstown was of coal prepared at Negley to meet the purchasers' specifications, and which could not have been so prepared elsewhere.

Applying to these facts the law laid down by this and other courts in such as the *Pipe Line cases*, the Commission concluded that the commerce incident to the common carrier transportation from Negley to Youngstown was intrastate, and subject to its jurisdiction, and quoted from the Circuit Court of Appeals in the *Campbell River Mills case* that:

> "The appellant cites no case in which a state commission has been found without power to regulate rates on intrastate shipments of goods brought into the state by agencies other than common carriers."

A secondary contention by the appellants is that the Commission lacked substantial evidentiary support for its conclusions of fact with respect to the movement of the raw run-of-mine coal from the mine in Pennsylvania to the preparation plant at Negley in Ohio. That particular evidence was all given by a representative of the owner of the coal, at the invitation of the Commission; these appellants as defendants before the Commission admitted that it was precise and frank, that it explained all the facts, and that it explained them all as appellants understood them and had themselves intended to show them. Appellants therefore offered no evidence themselves.

Obviously, upon such a record, appellants real secondary contention is that they disagree with the findings of the Commission upon that admittedly complete evidence. It is not necessary to cite authority for the proposition that the Court will not substitute its judgment on the facts for that of the Commission.

The Commission's order has the support of substantial evidence, adequate findings, and correct application of the law. It is a lawful order and the decree of the District Court upholding it should be affirmed.

Argument.

I. THERE WAS SUBSTANTIAL EVIDENCE BEFORE THE OHIO COMMISSION, NONE OF WHICH WAS IN ANY WISE CONTROVERTED, TO SUPPORT EVERY FINDING OF FACT MADE BY THE COMMISSION IN THE REPORT UPON WHICH ITS ORDER IS BASED.

(This has reference to Appellants' Assignment of Error 1.)

The attitude of the trunk lines as defendants before the Ohio Commission, their failure there to offer any evidence in chief, and the circumstances under which they declined then to offer such evidence, make it difficult to believe that their argument here, that the Commission lacked substantial evidence for support of its findings, is made in sincerity and good faith.

At the commencement of the hearing before the Commission, the trunk lines indicated that there was some doubt whether they would offer any evidence. Their doubt was apparently the result of a view that the complainant might not produce all the evidence which the trunk lines felt was in its possession. (R. 82) There was considerable discussion of this between counsel and the bench, as a result the presiding Commissioner asked that Mr. J. D. A. Morrow, President of the Pittsburgh Coal Company, the shipper of the four cars here directly involved, "make himself available to testify should you (*i. e.*, the trunk lines) desire to ask him any question." (R. 93)

Thereafter Mr. Morrow appeared and made a lengthy statement, not only with respect to the business of the Pittsburgh Coal Company as the shipper of the four cars, but generally with respect to its operation of coal mines in Pennsylvania; of towboats and barges on the upper Ohio river system of inland waterways; of its private track from Smith's Ferry, Pa., on the north bank of the

Ohio River, to Negley, Ohio; and of its coal processing plant at Negley, from which the four cars were shipped. (R. 144 *et seq.*)

At the conclusion of his testimony in chief by witness Morrow, counsel for the trunk lines characterized it as a "very precise statement" that would not require a great deal of cross-examination. (R. 155) Nevertheless, three of the four counsel for the trunk lines then proceeded to cross-examine witness Morrow at length, and his cross-examination and re-cross-examination occupy more of the record than do his direct and re-direct statements. (R. 155-168, 170-172)

Then, having had ample time over night to reflect on all that witness Morrow had said, counsel for the trunk lines when asked the next day if they had any testimony to offer, made reply as follows (R. 185):

> "Mr. Orcutt: Your Honor will recall that at the opening yesterday we were uncertain as to the amount of evidence which would be necessary. The amount of evidence which we felt would be necessary was dependent entirely upon how frankly the complainants presented the facts. After Mr. Morrow took the stand and explained all of the facts as we understood them and as we intended to show them by secondary evidence if the Pittsburgh Coal Company refused to present the best evidence, we discussed the matter last night and came to the conclusion that the evidence that we had would very largely be merely a repetition and cumulative of Mr. Morrow's statement. That being the case, we didn't wish to tax the time of this commission by putting in merely cumulative evidence. The defendants and intervenors therefore will rest upon the record as it is and upon our motion as just made."

We ask the Court to observe that witness Morrow's "very precise statement" was thus admitted by the trunk lines after ample opportunity to reflect upon it, to have presented and explained *all* the facts, and to have presented and explained them *as the trunk lines understood them* and

as they had themselves intended to show them. Yet they now contend that there is no substantial evidence of record to warrant the findings which the Ohio Commission made. We cannot refrain from again commenting that this contention can hardly be made in sincerity and good faith.

Doubtless the trunk lines prefer not to agree with the conclusions of fact which the Commission has drawn from that substantial evidence. That, however, is something entirely different from the contention that the Commission lacked substantial evidence for the conclusions which it did reach. It is not necessary in this Court to cite the mass of authority for the proposition that the Court will not substitute its judgment on the evidence for that of the Commission. *Florida* v. *United States,* 292 U. S. 1, 12. There are a host of authorities to the same effect concerning the review by the Supreme Court of Ohio of the action of the Ohio Commission respecting Ohio intrastate commerce, which is all that is here involved.

Settle et al., Partners, v. *The Public Utilities Commission of Ohio,* 94 O. S., 417, 419;

Pollitz et al. v. *The Public Utilities Commission of Ohio,* 96 O. S., 560, 565;

The Akron, Canton & Youngstown Railway Co. et al. v. *The Public Utilities Commission of Ohio,* 96 O. S., 359, 367;

The Lima Telephone & Telegraph Co. v. *The Public Utilities Commission of Ohio et al.,* 98 O. S., 110, 116;

The Hocking Valley Railway Co. v. *The Public Utilities Commission,* 100 O. S., 321, 326;

The Hardin-Wyandot Lighting Co. v. *The Public Utilities Commission,* 108 O. S., 207, 213, 214;

The Ohio Utilities Co. v. *The Public Utilities Commission,* 108 O. S., 143, 145;

City of Findlay v. *Public Utilities Commission,* 111 O. S., 827;

Eager, Jr., v. *Public Utilities Commission of Ohio,* 113 O. S., 604;

Solt et al. v. *Public Utilities Commission of Ohio, et al.,* 114 O. S., 283;

Lykins v. *Public Utilities Commission of Ohio*, 115 O. S., 376;
Granville & Newark Motor Service, Inc., v. *Public Utilities Commission of Ohio*, 119 O. S., 148;
West Ohio Gas Co. v. *Public Utilities Commission of Ohio*, 128 O. S. 301.

This same rule which has long guided this court and the Supreme Court of Ohio in review of the administrative action of rate regulating bodies, applies with equal force where the review is had incident to a conflict in regulation between the federal and state powers. See *Florida* v. *United States, supra*, p. 12.

There are but three findings of the Ohio Commission which appellants say lack substantial evidentiary support. These all have reference to the transactions involved in the movement of the coal up to Negley and do not relate in any respect to the common carrier transportation within the State of Ohio from Negley to Youngstown. In substance, appellants contend the Commission had no substantial evidence to support its findings (R. 221-222):

1. "That there was no dealing in or with respect to the coals involved in the course of their transportation from the mine in Pennsylvania, from Risher, in Pennsylvania, or from Smith's Ferry, in Pennsylvania, to Negley, in Ohio";
2. "That there was no through and continuous transportation from the mine (in Pennsylvania) to Negley (in Ohio)";
3. "That there was no commerce in the coal in the course of its transportation from mine to Negley."

It is first to be observed that the evidence before the Commission with respect to the movement of the coal up to Negley was the evidence of witness Morrow, President of the company which shipped the coal from Negley; in other words, it was this particular evidence which appellants admitted by statement of counsel before the Commission, was precisely and frankly given and showed all the facts as ap-

pellants understood them, and had intended themselves to show them.

That evidence, with respect to these three particular findings, may be summarized as follows:

The coal was originally mined in a so-called river mine owned and operated by the coal company. (R. 144-147, 151-154)

The coal throughout the movement from the mine, from Risher, Pa., or from Smith's Ferry, Pa., to Negley, remained in the ownership, possession and control of the Pittsburgh Coal Company. (R. 151-154, 160-162)

The coal company was also the owner of all the facilities employed in that movement. The evidence shows this to be true with respect to the private track of the coal company extending from the mine to the river tipple, a distance of 6.5 miles (R. 146, 151-152, 160-161, 169); it was true also with respect to the river tipple (R. 152); it was true with respect to the tow boats and barges by and in which the coal was moved down the river (R. 145, 152, 156-157, 168-169); it was true with respect to Risher Harbor (R. 147, 152, 163); it was true with respect to the dock and the river to rail transfer facilities at Smith's Ferry (R. 145-146, 152-153); it was true also with respect to the private track from Smith's Ferry to Negley and the equipment operating on the same (R. 145, 153, 156, 169, 172).

That the track from Smith's Ferry to Negley and the locomotives and cars operating on the same were the private property of the coal company; and that the operation thereon was the private operation of the coal company, was also found, as a matter of law to be the true situation in the opinion, the decree, and the findings of fact and conclusions of law of District Judge West in Equity Proceeding No. 4533, in the Northern District of Ohio, Eastern Division. (R. 151-154, 209-211, 212-217)

There was no through and continuous transportation from the mine to Negley and no maintenance of any original package in the cars or the movement from the mine to Negley. (R. 151, 169)

When the raw run of mine coal finally arrived at the Negley plant, it was put through the process of washing, cleaning, sizing and preparing with considerable loss of volume of the original coal and considerable change in the chemical and physical character of the coal. (R. 145-146, 149, 153-157, 158-159, 162-170) There was no intention at any time to sell the raw run-of-mine coal to any consumer; there was no dealing by the Pittsburgh Coal Company in the raw run-of-mine coal; and the only sale by the Pittsburgh Coal Company was of the prepared coal. (R. 149, 150, 151, 153-154, 158, 167)

The prepared coal was sold to the purchasers in Youngstown out of the Negley plant and could not have been sold out of the mine or any place other than the Negley plant, because the facilities for preparing the coal in the particular manner required by the purchasers were not available at any point other than the Negley plant. (R. 147, 149, 150-151, 153-154, 162)

None of this evidence was in any wise controverted; on the contrary, it was admitted by the appellants to show the true situation. It amply supports the finding that there was no dealing in, or with respect to the coals in the course of the movement from the mine to Negley; the finding that there was no through and continuous transportation of the coal from the mine to Negley; and the further finding that there was no commerce whatever in the coal in the course of that movement from the mine to Negley.

The District Court, therefore, did not err in its conclusion that "there is substantial evidence supporting the finding of the Public Utilities Commission of Ohio" on these particular points.

II. COMMON CARRIER TRANSPORTATION OF A PREPARED PRODUCT WHICH IS WHOLLY INTRASTATE IN *LOCUS* DOES NOT BECOME INTERSTATE IN CHARACTER MERELY BECAUSE THE RAW COMMODITY FROM WHICH THE PREPARED PRODUCT WAS PROCESSED HAD PREVIOUSLY BEEN MOVED FROM ANOTHER STATE BY NON-COMMON CARRIER FACILITIES WITH AN INTENT TO MARKET THE PREPARED PRODUCT IN THE SECOND STATE.

(This has reference to Appellants' Assignments of Error, 4, 5, and 6)

III. THE ORDER OF THE OHIO COMMISSION WAS A LAWFUL AND PROPER REGULATION OF OHIO STATE COMMERCE.

(This has reference to Appellants' Assignment of Error 2)

As has already been shown, the Ohio Commission upon substantial evidence, found, and the specially constituted district court affirmed, that there was no transportation, dealing or commerce incident to the movement of coal from the mine to Negley. That movement was the sole and private affair of the Pittsburgh Coal Company. It was not until the coal was prepared by the coal company in its Negley plant,—the only place where it could have been so prepared to meet the requirements of the purchasers,—and was then shipped by the coal company via the Lisbon and its connecting lines to those purchasers, that dealings with respect to the coal were had, first, between the coal company and the purchasers, and then between the coal company and the common carrier railroads.

It was precisely such a state of facts, showing a non-common carrier and wholly private movement into a state and a subsequent movement via a common carrier wholly

within that state, that drew from the Circuit Court of Appeals in *Chicago, M. St. P. & P. R. Co.* v. *Campbell River Mills Co.*, 53 F. (2d) 69, 73; *certiorari* denied, 285 U. S. 536; the comment equally pertinent here, that,—

> "The appellant cites no case in which a state commission has been found without power to regulate rates on intrastate shipments of goods brought into the state by agencies other than common carriers."

This view of the Circuit Court of Appeals is the logical, and indeed, the inevitable result of the fact that the interstate commerce act provides only for the regulation of common carriers and their transportation in interstate commerce.[1] This long-established policy of the Congress as respects railroads, has recently been extended to the public highways by the Motor Carrier Act, 1935,[2] which carefully distinguishes between the various motor vehicle carriers,—common, contract and private,—in the scheme of regulation therein provided. It should also be noted that in both the State of Ohio[3] and the Commonwealth of Pennsylvania,[4] wherein the Smith's Ferry-Negley private track of the Pittsburgh Coal Company lies, such private tracks are exempt as non-common carrier properties from regulation by the state commissions.

We do not overlook the fact that the Circuit Court of Appeals in the *Campbell River Mills case, supra,* went on to show that there are decisions holding that "goods brought into a state by private carriers, though transported by common carriers between points wholly within the state, nevertheless were articles of interstate commerce." It cites such cases with the explanation that "they did not involve either the making or enforcing of freight rates and are not controlling in such cases." The truth is that most

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[1] Interstate Commerce Act, Part I, Section 1 (1) (3).
[2] Interstate Commerce Act, Part II, Section 203 (14)-(17).
[3] Ohio General Code, Section 503.
[4] Pennsylvania Public Service Company Law, No. 854, Article 1, Section 1.

of the cases of the character so referred to by the Circuit Court of Appeals are tax cases and as such are subject to the rule which this court has long recognized—see *Baltic Min. Co.* v. *Massachusetts*, 231 U. S. 68, 85, that,—

> "Every case involving the validity of a tax must be decided upon its own facts."

We proceed, therefore, to an analysis of the cases which, for the most part, do "involve either the making or the enforcing of freight rates," and which are factually wholly, or largely on all fours with the instant case. For, despite the assertion of appellants to the contrary, in their Statement as to Jurisdiction (Page 4), there are many such cases, not only in the decisions of this court, but in the decisions of the subordinate federal courts, and of the Interstate Commerce Commission and The Public Utilities Commission of Ohio.

The line of decisions by this court which are most specifically here in point commences with the *Grant Brothers case, Santa Fe, P. & P. R. Co.* v. *Grant Bros. Constr. Co.*, 228 U. S. 177. The question there went to the right of a common carrier railroad to transport at contract rates less than the standard published rates for common carrier transportation, property of a construction company used in connection with the construction of the railroad's common carrier facilities.

After discussing at some length the legal obligations of common carriers, the court said,—

> "For these reasons, the common carrier, in the prosecution of its business as such, is not permitted to drop its character and transmute itself by contract into a mere bailee, with right to stipulate against the consequences of its negligence.
>
> Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier." (p. 185) * * *
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> * * * * * * * * * *

"In constructing, improving, or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, but, of course, is not acting as such." (p. 186) * * *

"It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith, and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See *Re Railroad-Telegraph Cos.*, 12 Inters. Com. Rep. 10, 11." (p. 188)

The substance of the court's decision in the *Grant Bros. case* was that a common carrier, engaged in the transportation of its own property, was not in such transportation acting as a common carrier. Obviously, this is all the more so with respect to a private corporation moving its own property, which was the position of the Pittsburgh Coal Company here in the movement of its own coal from its own mine via its own river and rail facilities to its own processing plant at Negley.

Next, in the decisions of this court, we find the *Pipe Line cases, United States* v. *Ohio Oil Co.*, 234 U. S. 546. There the Interstate Commerce Commission, pursuant to then recent amendments to the interstate commerce act, had entered an order requiring the appellant pipe line companies to file with the Commission their schedules of rates and charges for the transportation of oil. That order was under review by this court in that proceeding. The order was upheld with respect to all of the pipe lines except that of the Uncle Sam Oil Company. Concerning it, the majority opinion of the court said (pp. 561-562):

"There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line, to its own refinery, for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end."

Chief Justice White, in his concurring opinion, used this language to describe the particular situation of the Uncle Sam Oil Company (pp. 562-563):

"That company owns wells in one state from which it has pipe lines to its refinery in another state, and pumps its own oil through such pipe lines to its refinery; and the product, of course, when reduced at the refinery, passes into the markets of consumption. * * *"

"It is shown beyond question that the company buys no oil, and by the methods which have been mentioned simply carries its own product to its own refinery; in other words, it is engaged in a purely private business. Under these conditions, in my opinion there is no power under the Constitution without the exercise of eminent domain to convert without its consent the private business of the company into a public one."

This decision is authority for the proposition that a private corporation, engaged in the movement of its own oil from its own wells via its own pipe line facilities to its own refinery, although such movement is across state lines, is not engaged in transportation, let alone commerce, and is not subject to regulation under the interstate commerce act. This was the unanimous conclusion of the court, for

the judgment as to the Uncle Sam Oil Company was concurred in by Mr. Justice McKenna, who dissented otherwise.

The position of the Pittsburgh Coal Company incident to the transportation of its coal from the mines in Pennsylvania to the preparation plan. in Ohio, is exactly that of the Uncle Sam Oil Company, for the movement was of its own coal via its own private facilities to its own plant in the second state for processing or refining in that plant, analogous to the oil refinery.

We next refer to the *McCluskey case, McCluskey* v. *Marysville & N. R. Co.*, 242 U. S. 36, which arose under the Employers' Liability act. The gist of this decision is found in the following paragraph quoted by this court from the opinion of the Circuit Court of Appeals:

> "In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the state, depended upon chance or the exigencies of trade. The movement of the poles did not become interstate commerce until, by the act of the purchasers thereof, the poles were started on their way to their destination in another state or country. The beginning of the transit which constitutes interstate commerce 'is defined in Coe v. Errol to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage.' " (pp. 39-40)

This, again, is a case specifically in point. The Marysville & Northern Railway Company was nothing but the private logging track and the mere asset of the Stimson Mill Company. The logging track and the equipment operated over it, were analogous in every way to the private facilities of the Pittsburgh Coal Company via which the coal was moved from the mine in Pennsylvania to the processing plant in Ohio. The decision by this court was again unanimous.

Next we refer to the *Florida Oil case, Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U. S. 257. This is another case where, upon the decision by this court depended whether the lower intrastate Florida rates or the higher interstate rates applied on certain all-rail shipments of petroleum products wholly within the State of Florida.

The petroleum products in question reached Florida by tank steamers arriving at Port Tampa and Jacksonville. The tank steamers were owned and chartered by the sellers of the oil and moved originally from Baton Rouge, La., and Tampico, Mexico, and so far as these sellers were concerned, the ultimate delivery points of the petroleum products were Port Tampa and Jacksonville.

In some cases the petroleum products were pumped from the ship's tanks into storage tanks at the ports of entry and from the storage tanks were pumped into tank cars for the movement on the railroads. Among other facts developed were that at times the tank cars were being loaded out of the storage tanks at the ports while the storage tanks were simultaneously being filled with oil from the ocean vessels. In other instances, particularly as respects lubricating oils, the tank cars were loaded directly from the tank steamers, there being no intermediate storage at the ports. It was under these circumstances that there arose the question whether the subsequent rail transportation wholly within the state of Florida was interstate commerce and should pay the relatively higher interstate rates, or was

Florida intrastate commerce and should pay the relatively lower intrastate rates.

In determining that the commerce within Florida was in every instance intrastate in character, Chief Justice Taft spoke as follows for a unanimous court:

> "It seems very clear to us on a broad view of the facts that the interstate or foreign commerce in all this oil ends upon its delivery to the plaintiff into the storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars, bulk stations and drive-in stations, or directly by tank wagons to customers, is all intrastate commerce. This distribution is the whole business of the plaintiff in Florida. There is no destination intended and arranged for with the ship carriers in Florida at any point beyond the deliveries from the vessels to the storage tanks or tank cars of the plaintiff. There is no designation of any particular oil for any particular place within Florida beyond the storage receptacles or storage tank cars into which the oil is first delivered by the ships. The title to the oil in bulk passes to the plaintiff as it is thus delivered. When the oil reaches these storage places along the Florida seaboard, it is within the control and ownership of the plaintiff for use for its particular purposes in Florida. The plaintiff is free to distribute the oil according to the demands of its business, and it arranges its storage capacity to meet the future variation in its business needs at Tampa, Port Tampa, or Jacksonville, or St. Johns river terminal." (pp. 267-268)
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> "We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate." (p. 270)

It was obvious in this *Florida oil case* that the oil was not to be consumed merely at Port Tampa and at Jacksonville; it was clear from the outset that it would be distributed from those points to over one hundred different distributing places in the state. The case in that respect

is analogous to the case at bar, where it is also clear that the coal is not for consumption at Negley, the location of the processing plant, but at numerous points beyond Negley in the state of Ohio and even beyond.

The case is also analogous to that at bar because the transportation into the state was by private facilities of the producers of the oil at Baton Rouge and Tampico. Here the movement into the state of Ohio is by the private facilities of the producer of the coal at the Pennsylvania mines.

We come next to the *Campbell River Mills case,* decided in the District Court in *Campbell River Mills* v. *Chicago, M. St. P. & P. R. Co.,* 42 F. (2d) 775; in the Circuit Court of Appeals in *Chicago, M. St. P. & P. R. Co.* v. *Campbell River Mills Co.,* 53 F. (2d) 69; and wherein *certiorari* was denied by this court in S. 536.

This was another case wherein, upon the determination of whether the transportation in question was interstate or state commerce, depended whether the relatively lower state rates or the relatively higher interstate rates should apply on certain shipments of logs. The Mills Company owned growing timber located in one tract partially in the state of Washington and partially in British Columbia. In that timber it cut its own logs indiscriminately, and transported the same by its own private track Columbia Valley, to a point of shipment on the Milwaukee Road in the state of Washington. It is worthy of notice that this transportation of the logs, although over the private railroad of the Mills Company, was on log trucks furnished by the Milwaukee Road, that is, a part of the Milwaukee Road's common carrier equipment. Upon arrival of the loaded log trucks at Columbia Valley, the Mills Company there gave shipping instructions to the Milwaukee Road covering the movement of the loaded trucks of logs to Bellingham, Washington, via a wholly intrastate Washington route. At Bellingham the logs were unloaded, in part consumed local-

ly, and in part rafted by water to a destination in British Columbia.

On these facts the Mills Company contended that for the all-rail common carrier haul wholly in the state of Washington, freight charges should be assessed at the relatively lower intrastate Washington rates, whereas the Milwaukee road claimed that they should be assessed at the relatively higher interstate rates.

Both the District Court and the Circuit Court of Appeals were of the opinion that the commerce was intrastate Washington commerce; both courts commented upon the fact that the Interstate Commerce Commission had tentatively reported that it had no jurisdiction in the premises. (42 F. (2d) 775, 776; 53 F. (2d) 69, 70). The proceeding before the Commission, it may be noted, was under its Docket No. 18,298, *Campbell River Mills, Ltd.*, v. *Chicago, Milwaukee & St. Paul Ry. Co.*, and the dismissal of the complaint was without formal report by the Commission.

The District Court said:

> "The Interstate Commerce Act, as amended Acts of Cong. June 29, 1906 (34 Stat. 584), April 13, 1908 (35 Stat. 60); June 18, 1910 (36 Stat. 539), May 29, 1917 (40 Stat. 101), August 10, 1917 (40 Stat. 272), and February 28, 1920 (41 Stat. 456) applies to common carriers engaged in transportation of property under a common control for continuous shipment, but does not apply to goods of foreign origin but not *shipped* from a foreign country.
>
> 'Shipment' is the act of dispatching or delivery on board of the carrier. Fisher v. Minot, 76 Mass. (10 Gray) 260; Ledon v. Havemeyer, 121 N. Y. 179, 24 N. E. 297, 8 L. R. A. 245; Schmertz v. Dwyer, 53 Pa. 335; State v. Carson, 147 Iowa, 561, 126 N. W. 698, 140 Am. St. Rep. 330. A common carrier is one who undertakes to transport for hire from one place to another goods for such as employ him. Bay v. Merrill & Ring Lbr. Co. (D. C.) 211 F. 717, 720. A concern is not a common carrier carrying only its own products. Bay v. Merrill & Ring Lbr. Co. *supra*. See, also, Nordgard v. Marys-

ville & N. R. Co. (D. C.) 211 F. 721, affirmed (C. C. A.) 218 F. 737; Id., 243 U. S. 36, 37 S. Ct. 374, 61 L. Ed., 578.

The logs in issue had not entered commerce until committed for *shipment*. Commerce is a practical legal conception drawn from the course of business. Savage v. Jones, etc., 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182. There is a distinction between interstate commerce and interstate transportation. One is governed by the nature of the business; the other by the nature of the particular transportation. 'Commerce' is within inhibitions of the Sherman Act (15 USCA, Sections 1-7, 15), but 'transportation' may have no relation to interstate rates on shipment of the same goods within the same state. Atl. Coast Line R. Co. v. Standard Oil (C. C. A.) 12 F. (2d) 541, 547, 60 A. L. R. 1456; Atl. C. L. R. Co. v R. R. Com. of Georgia (D. C.) 281 F. 321, See, also C., M. & St. P. R. R. Co. v. Iowa, 233 U. S. 334, 34 S. Ct. 592, 58 L. Ed. 988; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 27 S. Ct. 360, 51 L. Ed. 540." (pp. 777-778)

It was on the appeal from the decree of the District Court holding that the commerce in question was intrastate, that the Judges of the Ninth Circuit commented, as already said, that "the appellant cites no case in which a state commission has been found without power to regulate rates on intrastate shipments of goods brought into the state by agencies other than common carriers." (p. 73)

This is another case on all fours with the case at bar. Indeed, it is fair to say that the case at bar is even more clearly demonstrated by the facts to be a case of purely intrastate commerce, for, in the *Campbell River Mills case,* although the movement of the logs was on the private log road, it was in common carrier facilities of transportation, whereas, in the instant case the entire movement, river and rail, from the mines to Negley was in and by the solely private facilities of the Pittsburgh Coal Company.

Of the reports of the Interstate Commerce Commission, we refer first to *Railroad-Telegraph Contracts,* 12 I. C. C. 10. In that proceeding the Commission interpreted an ad-

ministrative ruling, previously issued, and reading in part, as follows (p. 11):

> "Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material, supplies, and men for use in construction, improvement, or renewal work on the line of that carrier, provided such arrangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself."

The Commission's conclusion was as follows (p. 12):

> "After a careful consideration of the oral arguments of counsel and of the briefs submitted to us in support of these petitions, the Commission is of the opinion that the rulings above set forth are in exact conformity with the terms and spirit of the law. Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are *sui generis* and unlike any other contracts with carriers that have come to our attention."

Thus it will be seen that the Commission recognized that the railroad in transporting construction materials, not directly for itself but for its contractors, was not acting as a common carrier. In other words, the Commission so early as 1906 recognized that a common carrier engaged in the transportation of its own property over its own common carrier line, was not acting in a common carrier capacity. Again we say that rule is surely applicable to the movement by a private corporation of its own goods.

A decision by the Interstate Commerce Commission practically on all fours with the *Florida Oil case, supra,* is *United States Finishing Co.* v. *N. Y., N. H. & H. R. R. Co.*, 142 I. C. C. 331. There the Commission considered the question of tank car shipments of fuel oil from East Providence, R. I., a port of entry, via a wholly Rhode Island route, to Saylesville, R. I. The Commission's report shows (see p. 331) that the oil originated in Texas, and was transported

by the Gulf Refining Company by rail or pipe line to Port Arthur, Tex., thence in chartered vessels to East Providence, where it was unloaded direct into that company's storage tanks. There the oil remained in the possession and exclusive control of the Gulf Refining Company as a part of its stock to be subsequently distributed to complainant and others according to commercial needs. Complainant contracts with the Gulf Refining Company for its yearly supply of oil at a specified price f. o. b. East Providence. Shipments were drawn from that company's general storage supply and handled in the usual manner. Commenting upon similarity to the *Florida Oil case, supra,* the Commission said that,—

> "Upon this record we find that the shipments were intrastate. The complaint will be dismissed for lack of jurisdiction." (p. 333)

M. D. Friedman Co. v. *C. & O. Ry. Co.*, 194 I. C. C. 455, is another decision of the Interstate Commerce Commission, involving the transportation by a common carrier railroad of its own property. It is of principal interest for two reasons, first, the transportation was joint, being partly over the line of the carrier which owned the property, and partly over a connecting line which had no ownership in the property; second, the decision of the Commission is rested squarely upon the decisions in the *Grant Bros. case, supra,* and in the *Campbell River Mills case, supra.*

The facts show that the Southern Railway gathered up scrap iron along its line in the State of Indiana, loaded the same into cars, and moved the cars on its own rails to Lexington, Ky., at which point the Southern connected with the Chesapeake & Ohio Railway. The movement from the Indiana points where the scrap was loaded, to Lexington, was on a type of billing which, on its face suggested a shipper-carrier or common-carrier relationship. Upon arrival of the cars at Lexington, they were transferred to the Chesapeake & Ohio

and by it transported from Lexington to Ashland and there delivered to the consignee. The specific question was the character of the transportation via the Chesapeake & Ohio from Lexington, Ky., to Ashland, Ky., a wholly Kentucky route.

The Commission held that that transportation was intrastate Kentucky commerce, and spoke as follows:

> "But such billing, even though made out on a bill-of-lading form, nevertheless was neither in fact nor in law a bill-of-lading contract, so far as the transportation up to Lexington was concerned. This is true because a transportation contract, like any other contract, necessitates two parties, a shipper and a carrier for hire. For the transportation up to Lexington there was but one party, the Southern. That company was merely moving its own scrap material, in its own equipment, and over its own rails to Lexington. It was not doing this for hire. No party other than the Southern had any rights or duties whatever in connection with that transportation. Hence up to Lexington the above billing memorandum was not in any sense a transportation contract, and any implication of a shipper-carrier relation based thereon is misleading and wholly unwarranted." (p. 456)
>
> "Even though the common-carrier transportation occurred within a single State, do the facts of noninterruption of movement and non-breaking of bulk at Lexington in any way alter the jurisdictional situation? In this connection it is apparent that when a railroad corporation sells its discarded company material, which it lawfully may do, the sales contract has no different legal aspects than any other ordinary selling transaction; and the Southern, under the facts of record, was free to move the property to Lexington in any manner it saw fit. It happened to select its own railroad facilities. Those instrumentalities, under usual conditions, are impressed with the attributes of common carriage, but it was held by the Supreme Court in *Santa Fe, P. & P. Ry. Co.* v. *Grant Bros.*, 228 U. S. 177, that when a railroad company transports its own property it acts not as a common carrier but as a private carrier.

> Hence, the use in this instance of railroad instrumentalities up to Lexington did not impress upon that traffic anything to change the private character of the transportation. In legal contemplation the situation would have been no different had the scrap material been moved up to Lexington by private highway truck." (p. 457)
>
> "Upon further hearing, we reverse the prior finding of division 5 and now find, inasmuch as the transportation from Lexington to Ashland was unconnected with any interstate common-carrier transportation, that it is not within our jurisdiction." (p. 458)

Here, again, we say that if, as repeatedly found by the courts, and as found by the Commission in the *Friedman case,* the transportation by a common carrier of its own property is not common carrier transportation, then most certainly the movement by the Pittsburgh Coal Company, a non-common carrier corporation, of its own property over its private facilities, does not in any wise attach to the subsequent common carrier transportation from Negley to Youngstown and make of the latter interstate commerce.

A very recent decision of the Interstate Commerce Commission, simple in its facts, constitutes a very strong indication of the folly of the theory which the appellants maintain should be here applied. We refer to *Crowley* v. *Atchison, T. & S. F. Ry. Co.,* 206 I. C. C. 221. There the common carrier rail transportation involved was carloads of horses from Calexico and National City, Calif., via wholly California routes to California destinations. Nevertheless the rail carriers insisted that because the horses had originally been located in Mexico, and had been driven over the road across the international boundary to the points of rail shipment involved, that the subsequent common carrier transportation, wholly in California, was interstate in character. This contention the Commission set aside, after a discussion of the *Campbell River Mills case,* with the statement that "we are of opinion that the transportation was not

such transportation as is subject to the interstate commerce act." (p. 223)

We also refer the court to the decision of the Public Utilities Commission of Ohio, *National Mortar and Supply Co.* v. *The Pennsylvania Railroad Company, et al.,* Ohio P. U. C. Reports, 1929, page 79. It is not necessary to recite the facts and reference is made to the decision merely to indicate that the facts permitted the Ohio Commission to determine the issue upon the basis of the rule laid down by this Court in the *Florida Oil case, supra.* That Commission was likewise consistent in this proceeding.

We respectfully submit that all of these decisions,—and the decisions in this Court were invariably unanimous, fully support the proposition that this commerce in bituminous coal from Negley to Youngstown is wholly within the purview of the Public Utilities Commission of Ohio, and that that Commission's action with respect thereto was a lawful and proper regulation of Ohio intrastate commerce.

IV. THE ORDER OF THE OHIO COMMISSION, INSOFAR AS IT REQUIRES THE APPELLANTS IN THE FUTURE TO TRANSPORT, SWITCH AND DELIVER AS OHIO STATE COMMERCE, OTHER CARLOADS OF BITUMINOUS COAL TRANSPORTED INTO YOUNGSTOWN UNDER CIRCUMSTANCES AND CONDITIONS LIKE THOSE SURROUNDING THE TRANSPORTATION OF THE FOUR CARLOADS HEREIN DIRECTLY INVOLVED, IS NOT UNLAWFUL BECAUSE VAGUE AND UNCERTAIN.

(This has reference to Appellants' Assignment of Error 7.)

All of the Youngstown railway lines other than the complainant Youngstown and Suburban Railway were before the Ohio Commission as defendants. Only the Pennsylvania and the Erie, however, were there as named defen-

dants. (R. 71) The others were voluntarily there as intervening defendants. (R. 82) However, the order of the Ohio Commission which is here in issue runs only against the Pennsylvania and the Erie, the only trunk-lines concerned in this particular transportation of these four cars from Negley to Youngstown. (R. 41-42)

It is, however, interesting to observe that while the other trunk lines intervened before the Commission as defendants, they then quibbled quite a bit respecting the effect, as to them, of any order that the Commission might enter. (R. 82, *et seq.*) But they finally agreed that "if the order was a valid one • • • and imposed certain obligations on these defendants, then certainly the same regulations, the same law, would ordinarily apply to the interveners." (R. 83) Apparently in their Assignment of Error No. 7 (R. 222), and in their point 4 (R. 230) all of the trunk lines now seek to escape the obligation of that order, at least temporarily, by possible future litigation, should their appeal to this Court fail. In other words, they threaten recourse to a multiplicity of suits on each and every car as the same may be hereafter shipped from Negley, so as to hinder, harass and delay this Ohio intrastate commerce.

That portion of the Ohio Commission's order to which Assignment of Error No. 7 and Point 4 takes particular exception, requires that the Pennsylvania and Erie abstain from failing, etc., to switch and deliver "any other carloads of bituminous coal, at the Ohio intrastate rates or charges applicable for the switching of such traffic in Youngstown and contemporaneously in effect, that may be shipped from Negley, Ohio, and roadhauled into Youngstown by the Youngstown and Suburban Railway for delivery to consignees with private sidings on the line of the Erie Railroad in the city of Youngstown, under similar circumstances and conditions with respect to the four carloads of bituminous coal, herein directly involved as described in said report." (R. 42)

This particular requirement was not unthinkingly laid upon the Pennsylvania and the Erie. It was in direct response to the prayer of the complainant before the Commission for an order which would require the defendants not only to switch the four cars of coal directly involved, but also "any other carloads of bituminous coal likewise loaded, shipped, and billed from the point of physical connection of complainant and defendant The Pennsylvania Railroad Company in said Youngstown, via the connecting routes of said defendants in said Youngstown, to consignees located on the line of defendant Erie Railroad Company in said Youngstown." (R. 79)

There was good reason for inclusion of this particular prayer in the complaint. At that particular time things were happening in Youngstown, and threats as to what might happen were numerous. Under the circumstances, there was a well grounded understanding on complainant's part that an order of the Commission which, applying alone to the four cars directly in issue, might, if favorable to the complainant, merely give rise to further litigation with respect to other cars that might subsequently be shipped in the same manner. Upon the hearing before the Commission it developed that after the Pennsylvania had declined to receive and forward these four cars to the Erie, the Erie had advised the Y. & S. that if the four cars were in fact delivered to it by the Pennsylvania it (the Erie) would in turn refuse to switch the same at the Ohio intrastate rates to consignees on its line. (R. 118)

There is no question whatever here with respect to the common carrier transportation from Negley to Youngstown except as to its state or interstate character. The determination of that question depends solely upon what occurred in the course of the movement of the coal from the mine to Negley. Once the only question of law involved here is settled, the question of the character of the commerce from Negley to Youngstown is likewise settled, not

merely as to these four cars, but as to cars that may similarly be shipped in the future. No good reason appears, therefore, why the order, if it is sound in law, should not apply to the future transportation of other cars of bituminous coal likewise and under similar circumstances, shipped by the Pittsburgh Coal Company from its processing plant at Negley.

We therefore submit that the order of the Commission is not unlawful because of vagueness or uncertainty on account of its application to future instances of transportation handled under circumstances and conditions similar to those surrounding the transportation of the four cars in question here.

V. THE DISTRICT COURT DID NOT ERR IN DECREEING THAT THE BILL OF COMPLAINT SHOULD BE DISMISSED AT COMPLAINANTS' COSTS.

(This has reference to Appellants' Assignment of Error 3.)

On the strength of the arguments already advanced, we submit that the District Court committed no error in decreeing that the appellants' bill of complaint should be dismissed.

We also submit that there was no error on the court's part in providing that the trial should be at complainants' costs. Certainly on the *locus* of the transactions the only common carrier transportation here involved was wholly within the State of Ohio. The situation was one peculiarly within the rule long ago laid down by this court in *New York ex rel. Pennsylvania R. Co.* v. *Knight,* 192 U. S. 21, that,—

> "when service is wholly within a state, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally without the state; and unless the interstate char-

acter is established, locality determines the question of jurisdiction, *Coe* v. *Errol,* 116 U. S. 517, 29 L. Ed. 716, 6 Sup. Ct. Rep. 475, though not in all respects similar is very closely in point."

On the basis of this rule the trunk lines went beyond all color of legal right when they insisted upon prepayment of the switching at the interstate rates, especially at such ridiculous interstate rates as apply on this particular traffic. The Youngstown & Suburban was entitled to rely upon the presumption that the transportation of these particular four cars, being from a point where the Lisbon, the originating line, had no common carrier connection, and wholly within the State of Ohio, was Ohio intrastate commerce, and subject only to Ohio intrastate rates and charges. Furthermore, such a procedure would have constituted ample protection for the trunk lines in the event of a final determination that the interstate rates should have been paid. For under the Interstate Commerce Act transportation in interstate commerce must be paid for at the rates lawfully on file with the Interstate Commerce Commission and applicable thereto.

Under such circumstances we respectfully submit that all the costs of the litigation should be assessed against the trunk line appellants, inasmuch as it was on account of their failure to transport Ohio intrastate commerce at Ohio intrastate rates that the litigation became necessary.

Reply to Appellants' Opening Brief.

The appellants' opening brief deals with a great many subjects not essential to a correct understanding of the case or to a determination of the issues involved. Particularly it deals at great length and makes many charges respecting certain intercorporate relationships between the Y. & S., which was the complainant before the Ohio Commission, the Lisbon, and the Pittsburgh Coal Company.

This attitude comes distinctly as a matter of surprise, and we may say of amazement, to the appellees, for it constitutes an absolute about-face on the part of the appellants. This is very definitely shown by the proceedings before the Ohio Commission at R. 120-121. At that time objection was made by the complainant to queries directed to these intercorporate relationships, and the following colloquy occurred:

> "Mr. Gutheim: All I want to say is that we have spent a year going all through this same proposition in the Eastern District Court in Ohio, Federal Court, and all I am trying to avoid here is that we try again all of the points with respect to the ownership by the Pittsburgh Coal Company of the stock of these companies. There is nothing unlawful in that ownership.
>
> Mr. Orcutt: I didn't impute anything unlawful.
>
> Commissioner Schaber: I don't think it is offered with the intent of showing any unlawful relationship.
>
> Mr. Orcutt: Not at all, Sir, and this was my only question. I don't intend to try that whole case."

With that disavowal, the appellants abandoned that line of inquiry in the hearing before the Ohio Commission. They subsequently filed with the Commission the Findings of Fact and Conclusions of Law by Judge West in the injunction proceedings commenced by the trunk lines in the Northern District of Ohio, Eastern Division (R. 212-217) respecting the private track of the Pittsburgh Coal Company. Clearly those findings and conclusions, filed, as they actually were, as a part of and explanatory of Judge West's opinion, constitute no evidence in this proceeding; they merely explain Judge West's opinion (R. 209-211) in that proceeding. In submitting the matter to the Commission upon brief appellants referred to the control of the Lisbon and the Y. & S. by the Pittsburgh Coal Company, but made no contention and advanced no argument that the same were in any respect unlawful. The Commission, in its report, refers to the injunction proceeding in the Northern District

of Ohio, Eastern Division, to show that the opinion and findings of District Judge West demonstrated, as did the evidence in this proceeding, that the track from Smith's Ferry to Negley was the purely private enterprise of the Pittsburgh Coal Company. (R. 14, 17-19)

Appellants' petition below recited the control of the Lisbon and the Y. & S. by the Pittsburgh Coal Company (R. 3), but none of the ten paragraphs therein which aver unlawfulness in the Commission's order, in any way attacked those relationships. (R. 5-7) Likewise appellants' brief below merely referred to the control by the Coal Company of the two short lines, but made no point thereof save in one paragraph, as follows:

> "It should be borne in mind that the whole scheme of the Pittsburgh Coal Company in acquiring control of the Suburban and the Lisbon through stock ownership, the construction of the railway from Smiths Ferry to Brush Run and the cleaning plant at Brush Run, together with the connection with the Lisbon near Negley, Ohio, was a plan to market coal mined in Pennsylvania in northern Ohio chiefly at Youngstown." (p. 6)

Certainly that paragraph charged nothing unlawful.

Under such circumstances it is hardly to be wondered at that the District Court, in its decree, findings, and conclusions (R. 69-70) does not mention the intercorporate relationships. But the important thing to observe is that none of the appellants' seven assignments of error filed here (R. 221-222) mentions those intercorporate relationships; nor is there in any one of the six points upon which appellants chose to rely in this Court (R. 229-231) the charges of unlawfulness in those relationships which are now so vehemently argued.

The Ohio Commission in considering the complaint of the Y. & S., found it necessary to determine but one question, and that was whether or not this particular traffic from Negley to Youngstown was intrastate or interstate com-

merce. It had no concern with the private litigation or litigations between the appellants and any other parties. It had no concern with the intercorporate relationships and especially so because the appellants informed the Commission, as just shown, that they imputed nothing unlawful to those intercorporate relationships. Under the circumstances we deem it unnecessary for the Ohio Commission here to deal with that subject, and, indeed, it is not necessary for this Court to consider it.

However, we point out to the Court that the appellants' very extensive discussion of the, "Pittsburgh Coal Company," the "Intercorporate Relations," and the "Immediately Pertinent Facts," contains numerous statements and innuendoes not supported by record reference. For this reason, and because their discussion goes far beyond the facts testified to before this Commission, we cannot agree that "there is no controversy" as to the facts appellants recite.

Appellants' opening brief was long delayed in filing and serving, and therefore we shall separately answer *seriatim* the opening statements and the arguments of the appellants to the extent deemed necessary in the interest of accuracy.

Reply to appellant's opening statements.

In the court below District Judge Hough, now deceased, did not merely participate in the conference at which the case was decided. He "joined in the conclusion upon which the foregoing order is based." (R. 70)

Findings of Fact and Conclusions of Law.—The decree below does not, to be sure, formally state, under those headings, Findings of Fact and Conclusions of Law. But the necessary findings and conclusions are incorporated in the decree as follows:

> "The Court * * * is of the opinion that there is substantial evidence supporting the finding of the Public Utilities Commission of Ohio * * *." (R. 69-70)

> "The order complained of in the bill, since the interstate transportation covered by the record was carried on wholly by private carrier, and since the transportation by common carrier was wholly within the State of Ohio, is lawful and proper (Santa Fe, Prescott and Phoenix Ry. Co. v. Grant Bros. Construction Co., 228 U. S. 177; The Pipe Line Cases, 234 U. S. 548, 562; Atlantic Coast Line Rd. Co. v. Standard Oil Co. of Kentucky, 275 U. S. 257), and the prayer of complainants' bill should be denied." (R. 70)

These are the only findings and conclusions which were necessary for the support of the Ohio Commission's order, and it will be observed that the Assignments of Error filed by the appellants in this Court are addressed to the particular finding of fact and the particular conclusion of law so announced by the court below.

Rates from Pennsylvania Mines to Ohio Destinations.—None of the rates published for the transportation of coal from Pennsylvania mines to Ohio destinations apply over the particular water-and-rail route via which the coal here in question moved. There are no rates published and filed for the transportation of coal via those routes. The Interstate Commerce Commission has never undertaken to require that tariffs naming such rates be filed with it, required under Section 6 (1) of the Interstate Commerce Act, Obviously this is because that Commission well knows that none of this movement from the mines to Negley, Ohio, is common carrier transportation.

The Statute.—Appellants' quotation from Section 1 (3) of the Interstate Commerce Act improperly omits the very pertinent sentence reading, "Wherever the word 'carrier' is used in this act it shall be held to mean 'common carrier'."

The Switching Rates in Youngstown.—We have already referred, *ante*, pp. 4-5, to the fact that considered as intrastate Ohio commerce, these trunk lines charge for their switching service from the Y. & S. Railway to the con-

signee on the Erie Railroad, $7.65 per car; whereas, if the traffic be considered as interstate, as the trunk lines here contend, their charge for the identical service is $94.50 per car.

It is interesting, in view of the fact that the trunk lines now merely say that the interstate switching rates here involved "are materially higher" than the intrastate switching rates, to note just how that situation was developed in the proceedings before the Commission. There, counsel for the trunk lines, after a colloquy on the subject, stated:

> "We will show affirmatively later on that there are interstate rates that would move this traffic." (R. 125)

On this promise, however, the trunk lines never performed. On the contrary, having failed themselves to show what the interstate rates would be for this particular switching of coal for a few miles in Youngstown, they took the position that a showing by others would be irrelevant. (R. 180) Obviously, they considered the information irrelevant only when they finally awoke to the fact that the charges which they had promised later on to show, were utterly extortionate.

The reason for these extraordinary rates for this switching of coal in interstate commerce was frankly admitted by these same trunk lines in another proceeding, contemporaneously heard by the Ohio Commission, where the trunk lines attempted to cancel the intrastate switching rates and to substitute therefor the interstate rates of $94.50 per car. They there stated, with respect to the suspended schedules, that those schedules:

> "definitely exclude from the application of reciprocal switching rates and regulations coal and coke, carloads, ex Y .& S., and because respondents had never intended to switch these commodities for the Y. & S."
>
> "The rules proposed in the suspended schedules may be briefly summarized with a statement that they merely revise the language of existing provisions relating to switching arrangements between the Y. & S. Rail-

road and steam railroads at Youngstown applicable on traffic road hauled to that point by the Y. & S. Railroad in a way that would clearly denote the fact that respondents, for reasons heretofore stated, do not wish to switch the involved commodities for the Y. & S. Railroad."

See Investigation and Suspension Docket No. 142, *Switching Rates and Service at Youngstown, Ohio;* No. 8833, *The Youngstown and Suburban Railway Company* v. *The Baltimore and Ohio Railroad Company, et al.*, decided January 26, 1935; 1935 Annual Report, P. U. C. Ohio; order upheld in *Baltimore & Ohio Rd. Co., et al.* v. *Public Utilities Commission of Ohio*, decided December 11, 1935, 130 O. S. 258; 8 Ohio Bar 38.

It is to be observed that in that contemporaneous proceeding before the Ohio Commission, the order of the Commission required the maintenance of intrastate switching rates as then in effect and forbade their increase to the impossibly high level which the trunk lines maintain with respect to the interstate traffic on coal. That order of the Ohio Commission was appealed by the trunk lines to the Supreme Court of Ohio, and was there held to be lawful, in the decision cited above.

Proceedings before the District Court.—The application of the appellants to the District Court below, although originally assigned to be heard on May 11, 1935, was not heard on that date because of the incapacitation of two of the judges; it was finally heard and submitted on September 23, 1935, following which the final decree was entered on December 11, 1935.

Reply to appellants' argument.

Appellants' lengthy discussion on the subject of what is commerce overlooks that the question here is,—what is commerce subject to the Interstate Commerce Act and to regulation by the Interstate Commerce Commission?

However, out of that discussion we quote such words and phrases as,—

> "Interchange of goods,—
> Between traders and merchants,—
> Those who have and those who desire to acquire,—
> Exchange,—
> Owner and prospective buyer,—
> Article of trade,—
> Intercourse,—
> Carried on between man and man,—
> Commercial intercourse,—
> Buying and selling,"

as clearly indicating that commerce, as these appellants themselves understand it, contemplates a plurality of persons and a dealing between persons. Such words can have no reference whatever to a matter which is strictly and solely the private affair of one,—which is the case in the mines to Negley movement of the raw run-of-mine coal here.

But further on this subject, we are constrained to submit that in their quotations from *Coe* v. *Errol,* 116 U. S. 517, appellants overlook the very essential point that the court was there contemplating *common* carrier transportation. The Court said.(p. 527):

> "What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely: that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a *common* carrier for transportation to another State or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject." (Italics ours)

In the case at bar, there was no common carrier transportation between the mines and Negley, nor was there any

dealing; therefore, there was no commerce, and certainly no commerce subject to the Interstate Commerce Act and to regulation by the Interstate Commerce Commission.

VI. *THE SOUTHERN PACIFIC TERMINAL CASE* AND OTHER CASES RELIED UPON BY THE APPELLANTS ARE NOT HERE IN POINT, AND NOT AT ALL CONTROLLING.

The case principally relied upon by the appellants is the *Southern Pacific Terminal case,—Southern P. Terminal Co.* v. *Interstate Commerce Com.,* 219 U. S. 498, decided February 20, 1911.

It is only fair to add, however, that the great reliance of the appellants upon this case is tempered by reservations. They argue that "There is sufficient of resemblance" between the *Southern Pacific terminal case* and the case at bar to advance it; they make no contention that the case is "on all fours"; and they conclude their presentation with the suggestion merely that the *Southern Pacific terminal case* is "well worthy of consideration and of application in principle in the case at bar."

The truth is that the *Southern Pacific terminal case* is not here apropos at all and this is at once seen from even a cursory analysis of the extended statement of the facts which precedes the court's opinion (pp. 499-507). From this it appears that the question there involved was

> "undue preferences and advantages," which were found by the Interstate Commerce Commission to have been given a shipper, one E. H. Young by the appellant, Southern Pacific Terminal Company, * * * "through failure to exact from him payment of wharfage charges * * * while at the same time exacting such charges from other shippers:"

and also,—

> "from giving and allowing him * * * for his exclusive use, space on the wharves * * * while contemporane-

ously refusing and denying similar privileges to other shippers." (p. 499)

The lands upon which the terminal facilities were located had been granted and conveyed subject to an express covenant requiring,—

> "the construction of terminal facilities upon the property * * * for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems" (p. 500), and the lands were in fact pledged to such public use. (pages 518, 525)

Next, because,—

> "it was greatly to the interest of the city"

streets were ordered to be closed by Galveston city ordinance so as to—

> "maintain upon the property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors or assigns." (pp. 500-501)

> "The Southern Pacific Terminal Company is a Texas corporation, organized * * * to construct and maintain upon the property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship systems." (pp. 501-502)

> "Import and export traffic passing through Galveston passes over the wharves of the terminal company, and the only track facilities for such traffic are those owned by the terminal company on its own lands. And the Galveston, Harrisburg & San Antonio Railway is the only railway having physical connection with the tracks of the terminal company, and it does all of the switching to and from the tracks of the terminal company, charging $1.75 per car. The latter company receives a trackage charge of 50 cents per car. (pp. 502-503)

> "The terminal company * * * carries on a wharfage business and publishes a schedule of charges for

such business, which, however, is not filed with the Interstate Commerce Commission * * *." (p. 503)

"Such tariffs do not show that any exception is made as to the docks occupied by E. H. Young, * * *." (p. 503)

"The terminal company was a party to numerous circulars issued by the Southern Pacific Companies, known as the 'Sunset Route,' so termed, principally for advertising purposes. The circular of May 24, 1907 shows terminal charges (other than storage and switching). At the port of Galveston the circulars show a charge of one cent per 100 pounds on cotton-seed cake and meal." (p. 503)

There is "a lease under which Young is to pay the terminal company a yearly rental of $15,000." (p. 504)

"Young has certain advantages by reason of his contract with the terminal company * * *." (p. 505)

On these facts the court recognized a primary question to be whether or not this particular terminal facility and traffic over it was subject to the Interstate Commerce Act and the regulation of the Interstate Commerce Commission. (pp. 516-517) It determined that the terminal facilities and the traffic over the same were subject to that Act and to such regulations. The Court said (pp. 522-523):

"As was well said by the Interstate Commerce Commerce Commission: * * * The terminal company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority.'

> The reasoning of the Commission is justified by the statute. It includes in the term 'railroad' "all bridges and ferries used or operated in connection with any railroad, and also all the roads in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any said property."

How utterly inept is appellants' reliance upon this *Southern Pacific Terminal case* becomes glaringly apparent when comparison of the facts there and here is made. The facilities of the Pittsburgh Coal Company are not in any way charged with a public interest, but are its purely private property, erected upon its own lands, acquired by private purchase. The coal company is a private corporation, and is neither by charter nor practice a common carrier. Its facilities were constructed to handle and do handle no business except its own. It does not hold itself out to do a public business, it does no such business, and it neither publishes nor files with the Interstate Commerce Commission any tariff of rates and charges applicable to such business. It shares in no division of the rates of any common carrier. It leases none of these facilities to others and needs no lease itself, for it owns the facilities.

It may be that appellants fondness for the *Southern Pacific Terminal case* results from the quotation by this Court therein of that language of Section 1 (3) of the Interstate Commerce Act, as it then was, which includes in the term 'railroad':

> "* * * all the road in use by any corporation operating a railroad * * *." (see page 523)

If that be their principal reliance, it overlooks, first, that the only railroads covered by the Act are, by Section 1 (1),

common carrier railroads; but, more important, it also overlooks that by the amendments of 1920, the word "corporation" was stricken, and the words "common carrier" inserted in lieu thereof so that the phrase quoted above now reads in Section 1 (3):

> "* * * all the road in use by any common carrier operating a railroad * * *."

Thus Section 1 in double barrelled fashion excludes private tracks like that of the Pittsburgh Coal Company, from regulation as a common carrier. It may be pointed out in this connection that the Coal Company has long owned and operated other private tracks which it also uses in this particular movement, one being 6.5 miles long, extending from the mine in Pennsylvania to the Company's tipple on the Monongahela River. (R. 146, 151-152) Furthermore, the existence of private tracks of this kind is expressly recognized, and they are expressly protected by Congress in Section 1 (9) of the Interstate Commerce Act. And this Court held, in *Cleveland, C. C. & St. L. R. Co.* v. *United States,* 275 U. S. 408, that paragraph (9) is in no way affected by paragraph (22) of Section 1.

The authorities, including the *Southern Pacific Terminal case,* relied upon by the appellants in this Court are the same as have been relied upon by them throughout this litigation. Each of those cases was advanced before the Ohio Commission and received painstaking consideration at its hands. Because of this we shall not extend this brief unduly by a detailed argument to show that these cases are not in point, but will refer instead to the disposition thereof made by the Ohio Commission in its report as follows:

> *Coe* v. *Erroll,* 116 U. S. 517 (see R. 31).
> *Baltimore & O. S. W. R. Co.* v. *Settle,* 260 U. S. 166 (see R. 35).
> *Pennsylvania R. Co.* v. *Clark Bros. C. M. Co.,* 238 U. S. 456 (see R. 34).
> *South Covington & C. Street R. Co.* v. *Covington,* 235 U. S. 537 (see R. 13).

Railroad Commission v. *Texas & P. R. Co.*, 229 U. S. 336 (see R. 33).
Southern P. Terminal Co. v. *Interstate Com. Com.*, 219 U. S. 498 (see R. 32-33).
United States v. *Erie R. Co.*, 280 U. S. 98 (see R. 36-37).
Railroad Commission v. *Worthington*, 225 U. S. 101 (see R. 32)
Baer Bros. Mercantile Co. v. *Denver & R. G. R. Co.*, 233 U. S. 479 (see R. 34).
Champlain Realty Co. v. *Brattleboro*, 260 U. S. 366 (see R. 27).
Texas & N. O. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111 (see R. 33)
Kirmeyer v. *Kansas*, 236 U. S. 568 (see R. 31-32).

The *Florida Oil case*, which is recited and relied upon by these appellees, *supra*, has also been cited by the appellants and on that score was discussed at length by the Ohio Commission in its report at R. 13, 35-36. The *Social Circle case*,—*Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, is too well known in its real points to merit discussion in this controversy.

VII. COMMON CARRIER TRANSPORTATION OF A PREPARED PRODUCT IN INTRASTATE COMMERCE DOES NOT LOSE ITS INTRASTATE CHARACTER AND BECOME INTERSTATE COMMERCE BECAUSE THE RAW COMMODITY FROM WHICH THE PREPARED PRODUCT WAS PROCESSED, WAS INTENDED WHILE IN THE COURSE OF ITS MOVEMENT INTO THE STATE BY THE PRIVATE FACILITIES OF THE OWNER, TO BE PROCESSED AND THEN SOLD IN THAT STATE.

The president of the coal company stated before the Commission that the intention of his company has been, and is,

to sell the prepared coal out of the Negley plant to consumers at destinations beyond, in Ohio and elsewhere. (R. 164-165, 167-168)

When the raw run-of-mine coal is mined in Pennsylvania, and when it comes into the Negley plant in Ohio, however, none of it is consigned, or could it be consigned, to any particular person, nor it there any pre-determined destination. (R. 147, 149, 150-151, 157-158) Indeed, as already said, it has not theretofore been consigned or destined at all, for it has always and at all times been in the ownership, possession, and control of the Pittsburgh Coal Company, for preparation as the trade might require, in its own plant at Negley. Moreover, it could not be prepared in the manner the trade requires, except at Negley, for the necessary preparation facilities are nowhere else available for this coal. (R. 149, 153-154)

Because there is, in the course of the private movement of the coal from the mines in Pennsylvania to the Negley plant, an intent on the part of the Pittsburgh Coal Company ultimately to sell it in refined form to some person located at some point in Ohio or some other state, the trunk lines contend that the coal is in commerce, and in interstate commerce, during the movement from the mines to Negley, and that therefore the subsequent commerce involved in the transportation from Negley to Youngstown is interstate, and subject to the Interstate Commerce Act. (R. 230)

This contention is explicitly denied by the numerous controlling decisions to which we have already adverted. In practically every one of them the "continuing purpose and intent of the shipper and owner to sell or otherwise commercially dispose of" the commodity,—the circumstance so greatly stressed by these appellants in the instant case,—was present. Yet in all of those cases, the courts and the administrative bodies have uniformly held the transportation to be intrastate.

Thus, in the *Pipe Line cases, supra,* the private movement of the oil in the owner's private facilities was to the own-

er's refinery, analogous to the Pittsburgh Coal Company's Negley preparation plant here. Yet that private movement was held not even to constitute transportation, let alone commerce, although, as Chief Justice White very pertinently observed (p. 562), it was always intended that the refined oil there, like the prepared coal here, should ultimately be sold and shipped in commerce.

In the *McCluskey case, supra,* this Court said:

> "In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment." (page 39)

Again, the intent to sell the commodity at the termination of its private movement was obviously present during that movement. And so here, as in the *McCluskey case,* the private movement of the commodity, the run-of-mine coal from the mine, wherein it was mined, to Negley, where it was prepared and sold, was not a shipment.

In the *Florida Oil case, supra,* the ultimate delivery points of the inbound oils were the ports of entry, Port Tampa and Jacksonville. But contemporaneously with that movement by private tank steamers, it was always intended and known that the oil would, in its original form, move beyond those ports of entry to over 100 destinations throughout Florida. In fact, the oil sometimes was loaded from the ocean vessel directly into the common carrier tank cars for common carrier movement to ultimate Florida destinations; in other cases the common carrier tank cars were being loaded out of storage tanks into which the oil was being simultaneously pumped from the ocean vessel. Yet in every instance, that Florida intrastate transportation was held to be intrastate commerce. Here, although the "continuing purpose and intent" to market the coal beyond Negley was present during the private movement to Negley, it was present not with respect to the run-of-mine coal, but to some product thereof, to be prepared at Negley, the

only place where it could be so prepared, to meet the requirements of the ultimate purchaser.

In the *Campbell River Mills case, supra*, all of the movement of the logs from the standing timber to Columbia Valley, the point of common carrier shipment on the Milwaukee road, was by the facilities of the Mills Company except that the logging trucks which were taken by the Mills Company from Columbia Valley into the timber empty and returned loaded, were the property of the Milwaukee road.

There was no dealing whatever with respect to these logs until they were shipped by the Mills Company over the Milwaukee from Columbia Valley to Bellingham for disposition to purchasers there or beyond. But such disposition was always in contemplation from the inception of the private movement of the logs from the woods. In the case at bar the facts showing a solely private movement of the commodity up to the point of common carrier shipment in the state of sale, are even stronger, for here even the equipment, water and rail, in which the coal was moved was in every instance owned by the Pittsburgh Coal Company, which also owned the coal.

The Interstate Commerce Commission in deciding the *Friedman case, supra*, recognized that the commodity (scrap iron owned by the Southern Railway) which was originally transported by the Southern Railway, was covered by the usual bill of lading. But even so, the Commission said that it was not in law a bill of lading contract because it was a document in which the Southern dealt with itself. Thus the fact that the Southern Railway covered the shipment with the usual bill-of-lading contract showing that the scrap iron was to go to a purchaser beyond its own rails, did not put the transportation thereof upon the Southern in the classification of commerce. The scrap iron did not enter into commerce until it passed beyond the rails of the Southern and commerce therefore commenced within the state of Kentucky on the rails of

the connecting carrier, the Chesapeake & Ohio. This was so despite the fact that, as evidenced by the bill of lading, there was a continuing intent and purpose that the scrap iron was to be delivered to the Chesapeake & Ohio for the purchaser without further intervention by the Southern.

In the *Crowley case, supra,* the report of the Commission shows that the animals shipped were wild range animals "suitable only for slaughter in making animal products, such as dog food." (p. 222) It was therefore known when they were driven across the international boundary from Mexico to California shipping points that there was some destination beyond, at the slaughtering points. Nevertheless the Commission found no difficulty on the doctrine of the *Campbell River Mills case* in concluding that the rail transportation from California points to California points was intrastate. The "continuing intent and purpose" when the animals were driven from Mexico into California to market them beyond the rail shipping points did not make of the California intrastate transportation anything other than intrastate commerce.

These cases, culled from those cited in support of our Propositions II. and III. do not exhaust the authorities on this particular subject. Another case directly in point is *Arkadelphia Milling Co.* v. *St. L. S. W. R. Co.,* 249 U. S. 134. In that proceeding timber was logged in Arkansas and moved by railroad to a mill in Arkansas, where it was manufactured and stored pending final transportation to market. The question was whether, because of the final movement, that first movement of the logs from the timber to the mill, within Arkansas, was interstate commerce. It appeared that "about 95 per cent of the sale of finished articles, that is, of the total outbound shipments, were made for delivery at points outside the state of Arkansas, the remaining 5 per cent being sold and delivered, or shipped to points within the state of Arkansas." (p. 150) It further appeared that "all of them (the shippers) knew

and intended at the time they brought the rough material into the mill, on account of previous course of dealings in the business, that 95 per cent of the finished product would be by them shipped to points outside the state of Arkansas." (p. 151) In the face of these facts this Court was of the opinion that the transportation of the rough material from the timber to the mills was intrastate Arkansas commerce. The Court said:

> "• • • the fact that previous experience indicated that 95 per cent of it must be marketed outside of the state, so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. *The question is too well settled by previous decisions to require discussion.*" (pp. 151-152; italics ours)

Almost twenty years ago, therefore, this Court stated without reservation that the point here relied upon by these appellants was without merit, and in the face of that statement any further discussion of authorities to support our position would be superfluous. We respectfully submit that any purpose and intent on the part of the Pittsburgh Coal Company, in the course of its private movement of its run-of-mine coal to Negley, sometime to market the prepared product thereof at points beyond Negley and by common carrier transportation in Ohio did not make interstate commerce of that Ohio transportation.

VIII. THE STATE OR INTERSTATE CHARACTER OF THE COMMERCE IN THE TRANSPORTATION OF THIS COAL FROM NEGLEY TO YOUNGSTOWN DOES NOT DEPEND UPON THE ASSESSMENT OR NON-ASSESSMENT OF DEMURRAGE FOR THE DETENTION OF EMPTY OR LOADED CARS AT THE NEGLEY PLANT.

The point advanced by the appellants is that these particular shipments of coal "were actually treated by car-

riers controlled by the shipper, as in interstate commerce."

On this general subject we first say that this is not a commodities clause proceeding, nor is there any such proceeding pending anywhere, to our knowledge, with respect to the intercorporate relationship of the Pittsburgh Coal Company, the Lisbon and the Y. & S. Moreover, this court has recognized that mere ownership by a railroad company of capital stock, or the controlling capital stock of a mining company does not necessarily violate the commodities clause,—see *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 272-273; *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 529; *United States* v. *Reading Co.*, 253 U. S. 26, 62-63;—*a fortiori*, the ownership by the mining company of the stock of railroad companies. The law of Ohio is to the same effect.

The demurrage rules involved are not at all rules peculiar to the two short lines, either as respects their publication or their application. They constitute a Uniform Code published by the American Railroad Association Tariff Bureau (R. 175-176), have been long applicable on all railroads throughout the country on both state and interstate traffic, and were recognized by this court as a uniform code so far back as 1912. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 286. Their uniform application is policed by territorial policing organizations, of which the Eastern Demurrage and Storage Bureau operates in the territory here involved, and the Lisbon and Y. & S. come within its jurisdiction. (R. 175-180, 205-209)

This Uniform Demurrage Code, insofar as here involved, provides:

> "Section A. "Cars of either railroad or private ownership held for or by consignors or consignees for loading, unloading, forwarding directions or for other purposes, (including cars held for loading company material unless the loading is done by the railroad for which the material is intended and on its tracks) are subject to these demurrage rules except as provided in Section B." (R. 177)

In such exceptions is found:

> "Section B, Item 3. Empty cars placed for loading coal, coal blocks, coal brickettes or coal boulets, at coal mines, coal mine sidings or coal washers or for loading coke at coke ovens, when the washers or ovens are located at or adjacent to the mines producing the coal to be washed or to be used in making coke, and such cars under load with such commodities at such mines, mine sidings, coal washers or coke ovens." (R. 176)
>
> "Note 2. Coal washers and coke ovens shall not be considered as adjacent to coal mines when the coal to be washed or to be used in making coke is moved from the mines to the washers or coke ovens under freight tariff rates." (R. 176)

It is of interest to observe that this railroad tariff definition of the word "adjacent" goes beyond the bare dictionary meaning, and is based upon one of the principal points here relied upon by the Ohio appellees,—*i. e.*, that a movement not under freight tariff rates is not a common carrier movement and is not commerce.

Applying these Sections A and B and Note 2 to the latter to the traffic here involved, the Y. & S. "considered that the cars placed at this coal washery (at Negley) for loading or held under load are exempt from demurrage." (R. 176-177) It so advised the Eastern Demurrage and Storage Bureau in response to the latter's circular to all railroads on the subject (apparently fortuitously issued just after the movement of the four cars in question, on September 21, 1934) in the following language (R. 209):

> "Our interpretation of this tariff provision is that this coal washing plant at Negley, O., must be considered as adjacent to the mines which produce the coal as the coal has not moved from the mines to the washing plant under freight tariff rates, and we consider the cars placed for loading coal at this particular washing plant are exempt from demurrage charges under the tariff as it now stands."

Acknowledging this statement of its practice by the Lisbon, the Manager of the Bureau advised in reply that (R. 207-208):

> "It is not our purpose to take issue with your interpretation in connection with the coal washery at Negley, Ohio, which handles coal coming from barges on the Ohio River, which is moved from the mines to the washing plant over facilities and in equipment owned entirely by the company operating the washing plant—at least, not unless and until the A. R. A. takes cognizance of such situation which would obligate us to again bring it to your attention."

Thus, it will be observed, the practice of the Lisbon with respect to the exemption from demurrage of cars placed for loading or under load at the Negley plant is clearly within the precise language of the uniform demurrage rules of all carriers, including these appellants; and the railroad organization which has charge of policing the subject in this particular territory takes no issue with that practice.

Further, and by way of specific reply to the charge that the Lisbon "treated" these shipments, insofar as demurrage is involved, as interstate commerce, we say that this is necessarily so, because the rules governing demurrage are the same on both state and interstate commerce, being uniform in their application.

Conclusion.

For all of which these appellees respectfully submit that the order of the Ohio Commission is a lawful order; that the District Court committed no error in refusing to enjoin it; and that the decree of the District Court ordering

the petition below dismissed, and at the costs of the plaintiffs, should be affirmed.

Respectfully submitted,

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Attorney General of Ohio,
and
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April 3, 1936.

APPENDIX.

Pertinent Portions of Statutes Cited.

Ohio General Code, Section 503.

"This chapter shall not apply to street and electric railroads engaged solely in the transportation of passengers within the limits of cities, or other private railroads not doing business as common carriers."

Pennsylvania Public Service Company Law, No. 854, Article 1, Section 1.

"The term 'Public Service Company,' when used in this act, includes all railroad corporations, * * * common carriers, * * * doing business within this State, and also all persons engaged for profit in the same kind of business within this Commonwealth; * * *

The term 'Railroad Corporation', as used in this act, includes every corporation owning, leasing, operating, or managing or controlling, any railroad for public use within this Commonwealth.

The term 'Railroad', as used in this act, includes every railroad other than a street railway, by whatsoever power operated, for public use in the conveyance of passengers or property, or both, with all bridges, ferries, tunnels, facilties, plant, and equipment thereof.

The term 'Common Carrier', as used in this act, includes any and all common carriers, whether corporations or persons, engaged for profit in the conveyance of passengers or property, or both, between points within this Commonwealth, by, through, over, above, or under land or water, or both. * * *"

Interstate Commerce Act, Part I, Section 1 (1).

"That the provisions of this part shall apply to common carriers engaged in—(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or

partly by pipe line and partly by railroad or by water; * * *;"

Interstate Commerce Act, Part I, Section 1 (3).

"The term 'common carrier' as used in this part shall include all pipe-line companies; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier'' is used in this part it shall be held to mean 'common carrier.' The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Interstate Commerce Act, Part I, Section 1 (8).

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities

as may be necessary and intended for its use in the conduct of its business as a common carrier."

Interstate Commerce Act, Part I, Section 1 (9).

Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch lines of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission other than orders for the payment of money.

Interstate Commerce Act, Part I, Section 1 (18)-(22).

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over

or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operated.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation,

or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Interstate Commerce Act, Part I, Section 6 (1).

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedule shall be plainly printed in large type and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part."

Interstate Commerce Act, Part II, Section 203 (14).

"The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or for-

eign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of Part I."

Interstate Commerce Act, Part II, Section 203 (15).

"The term 'contract carrier by motor vehicle' means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation."

Interstate Commerce Act, Part II, Section 203 (16).

"The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle."

Interstate Commerce Act, Part II, Section 203 (17).

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 746.

THE PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, and THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, *Appellants*,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, Attorney General of the State of Ohio, and PITTSBURGH COAL COMPANY, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEE, PITTSBURGH COAL COMPANY.

DON ROSE,
Counsel for Appellee.

HOWARD M. SWARTZ,
Of Counsel.

April 4, 1936.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
The Limited Scope of this Brief	2
The Interest of the Coal Company in this Suit	2
Statement of the Case	2
Concerning the Use Made in this Case by Appellants of the Findings of Fact of Judge West in the Case of Pennsylvania Railroad Company and Pittsburgh and Lake Erie Railroad Company v. Pittsburgh, Lisbon, and Western Railroad Company, et al., in Equity No. 4533 in the United States District Court for the Northern District of Ohio, Eastern Division	3
Inaccuracies of Statement of Fact in Appellants' Brief	6
ARGUMENT	9
I. THE COAL COMPANY'S PROJECT FOR MARKETING COAL IN OHIO MARKETS IS OF A PRIVATE INDUSTRIAL CHARACTER	9
Testimony Relating to the Coal Company's Brush Run Plant and Its Plant Tracks	11
Testimony Relating to the Four Carloads of Prepared Coal Prior to Its Shipment on the Lisbon	14
II. THE OWNERSHIP BY THE COAL COMPANY OF THE STOCK OF THE LISBON AND THE Y. & S. IS IRRELEVANT TO THE ISSUES OF THE CASE	17
The Proposed Extension of the Lisbon in 1929	17
The Youngstown & Suburban Connection with the Lisbon	19
The Coal Company's Private Enterprise	20
The Coal Company's Enterprise is not the Same Thing as the Once Proposed Lisbon Extension Either in Law or Fact	22

Page

There is No Evasion of the Interstate Commerce Commission's Order or of Interstate Freight Rates.. 24

Appellants Misconstrue the Southern Pacific Terminal Company Case 26

CONCLUSION 32

APPENDIX 34

Interstate Commerce Act, Part I, Sec. 1 (1) 34
Interstate Commerce Act, Part I, Sec. 1 (2) 34
Interstate Commerce Act, Part I, Sec. 1 (3) 34
Interstate Commerce Act, Part I, Sec. 1 (9) 35
Interstate Commerce Act, Part I, Sec. 1 (18) 35
Interstate Commerce Act, Part I, Sec. 1 (22) 36
Sketch or Map
Photographs of the Coal Company's Preparation Plant at Brush Run, Ohio

TABLE OF CASES AND OTHER AUTHORITIES CITED.

Page

Bullen v. *Wisconsin*, 240 U. S. 625 25
Cleveland C. C. & St. L. Ry. Co. v. *U. S.*, 275 U. S. 404 24
Construction of Branches by Pittsburgh, L. & W. R. Co., 150 I. C. C. 43; 150 I. C. C. 619..... 18, 19, 23, 24
Continental Securities & Investment Company v. *Rawson*, 208 Cal. 228 31
Corsicana National Bank v. *Johnson*, 251 U. S. 68..... 30
Ford Motor Co. v. *Farrington*, 245 Fed. 850 (C. C. A.) 4
Gledhill v. *Fisher & Company* (Supreme Court of Michigan), 262 N. W. 371 31
Haskell v. *McClintic-Marshall Co.*, 289 Fed. 405..... 30
Hooper-Mankin Company v. *Matthew Addy Co.*, 4 Fed. (2nd) 187 (C. C. A. 6th) 31
Merriman v. *C. & E. I. R. Co.*, 66 Fed. 663 (C. C. A.).. 4
New York Trust Company, et al., v. *Carpenter, et al.*, 250 Fed. 668 (C. C. A. 6th)..... 31
The Pennsylvania Railroad Company and The Pittsburgh & Lake Erie Railroad Company v. *The Pittsburgh, Lisbon & Western Railroad Company*, Equity No. 4533, District Court of the United States for the Northern District of Ohio, Eastern Division 17. 20, 21, 22, 36
Peterson v. *Chicago R. I. & P. R. Co.*, 205 U. S. 364.... 30
Piedmont and Northern Ry. Co. v. *U. S.*, 280 U. S. 469 25
The Pipe Line Cases, United States v. *Uncle Sam Oil Company*, 234 U. S. 548 ..... 24, 28
Pittsburgh and Buffalo Co. v. *Duncan*, 232 Fed. 584....30
Powell on *"Parent and Subsidiary Corporations"*... 30
Pullman's Palace Car Co. v. *Missouri Pacific R. Co.*, 115 U. S. 587 30
Southern Pacific Terminal Co. v. *Interstate Commerce Commission and Young*, 219 U. S. 498..... 26, 29, 31
United States v. *Hall*, 63 Fed. 472 (C. C. A.)..... 4
William Wrigley, Jr. Co. v. *L. R. Larson, Jr. Co.*, 5 Fed. (2nd) 731 31
Youngstown & Suburban Ry. Operation, 175 I. C. C. 699 20
M. D. Friedman Co. v. *C. & O. Ry. Co.*, 194 I. C. C. 455 8
U. S. v. *Uncle Sam Oil Company*, 234 U. S. 548.... 24, 28

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THE PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, and THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, *Appellants*,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, Attorney General of the State of Ohio, and PITTSBURGH COAL COMPANY, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEE, PITTSBURGH COAL COMPANY.

Pittsburgh Coal Company (hereinafter called the "Coal Company") became a party defendant in this suit by reason of its intervention in the District Court below. Its petition for intervention, together with a sworn answer to the Bill of Complaint, were presented to the District Court on September 23, 1935, the date of the final hear-

ing of the case in that Court. The intervention, however, was not allowed until December 11, 1935 (R. 56), the date of the final decree (R. 69). The said petition and answer were ordered filed on that date (R. 61).

The Limited Scope of this Brief.

As this Appellee is in substantial accord with the positions taken by the appellees, Public Utilities Commission of Ohio, and John W. Bricker, Attorney General of the State of Ohio, this brief will be confined largely to matters not dealt with in the brief of the said appellees.

The Interest of the Coal Company in this Suit.

The Coal Company, as shipper and vendor of the four carloads of prepared coal, involved in this suit, and as the owner of the processing plant located at Negley, Ohio, from which the prepared coal was sold into the market, and as a prospective shipper of prepared coal to be similarly sold into the market from that plant, has a vital interest in the determination of the question here presented. The difference in the switching cost at Youngstown (as illustrated in the case of the four cars involved) between the intrastate switching rate of $7.65 per car and the interstate road haul charges which amount to $94.50 per car, considering the volume of tonnage which the Coal Company may reasonably expect to sell from its plant to the Youngstown markets, clearly shows the vital interest of the Coal Company in the questions involved (R. 116-117, 181-182).

Statement of the Case.

This Appellee adopts the statement of the case made in the brief filed herein by the Appellees, Public Utilities Commission of Ohio, and John W. Bricker, Attorney General of the State of Ohio.

This Appellee will, however, call attention to the improper and prejudicial use by Appellants of matters which

are not in evidence in this case; and point out certain inaccuracies of statement of fact made by Appellants in their brief concerning the method and conduct of Appellee's business and respecting its past corporate relationship with the Pittsburgh, Lisbon and Western Railroad Company and the Youngstown and Suburban Railway Company.

CONCERNING THE USE MADE IN THIS CASE BY APPELLANTS OF THE FINDINGS OF FACT OF JUDGE WEST IN THE CASE OF PENNSYLVANIA RAILROAD COMPANY AND PITTSBURGH AND LAKE ERIE RAILROAD COMPANY VS. PITTSBURGH, LISBON, AND WESTERN RAILROAD COMPANY, ET AL., IN EQUITY NO. 4533 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In a topic in Appellants' brief labeled "Intercorporate Relations—Pittsburgh Coal Company, Etc.," (Appellants' Brief, Page 9), a lengthy recital is made of past relations (dating back to the year 1927) between the Coal Company, and the Youngstown and Suburban Railway Company (hereinafter called the "Y & S") and the Pittsburgh, Lisbon and Western Railway Company (hereinafter called the "Lisbon"), the stock of which carriers is either wholly or largely owned by the Coal Company. By the manner in which the recital is made in Appellants' brief and by the use of page references to the record, the impression is given that the Appellants are summarizing testimony introduced below as evidence in this suit, either before the Commission or the District Court. Such, however, is not the case. The recital is in large part of matter selected and culled from the Findings of Fact made by Judge West in the case of *Pennsylvania Railroad Company and Pittsburgh and Lake Erie Railroad Company v. Pittsburgh, Lisbon and Western Railroad Company, et al.*, in Equity No. 4533 in the United States District Court for the Northern District of Ohio, Eastern Division (R. 212).

The record in the instant suit may be searched in vain for even a suggestion that the Findings of Fact in that case have been introduced or received as evidence in this suit, or that the parties to this suit have agreed that they should be considered as such. The truth of the matter is that the Findings of Fact in that case found their way into this record not as evidence in this suit, but as explanatory of the short memorandum opinion (R. 209) and final decree (R. 211) of Judge West, who in that case dismissed the bill of the trunk-line carriers and refused to grant either a temporary or permanent injunction against the construction and operation by the Coal Company of its private railroad tracks serving its coal preparation plant at Negley, Ohio.

For three additional reasons this Appellee submits that Appellants are attempting an improper use of matter not here in evidence or in issue in this suit.

In the first place, Appellants are attempting to broaden the scope of the appeal beyond the limits of their Assignments of Error and to change the theory of their case on appeal by advancing in this Court a new theory for the first time.[1] That this is so is readily demonstrated by reference to the Assignments of Error (R. 221) and Statement of Points Relied Upon (R. 229), and by reference to the conduct of the trial of the case below where Appellants offered no evidence concerning the matters they now desire to stress and placed no reliance on those matters in oral or written argument (R. 120-121).

In the second place, the Findings of Fact of Judge West cannot, in any sense, be said to represent, at the time of the events involved in this suit, the facts respecting the relationship between the Coal Company and the two railroad companies whose stock it owns. Those findings were made in January 1934 upon evidence taken by deposition in the

[1] It is well settled that where a case is tried on one theory in the Court below, another theory cannot be substituted in the appellate court. See *Merriman* v. *C. & E. I. R. Co.*, 14 C. C. A. 36, 24 U. S. App. 641, 66 Fed. 663; *United States* v. *Hall*, 11 C. C. A. 294, 21 U. S. App. 402, 63 Fed. 472; *Ford Motor Company* v. *Farrington*, 245 Fed. 850 (C. C. A. 9th).

midsummer of 1933. The events involved in the instant suit took place in September of 1934 (R. 147, 173). The hearing of the instant case before the Commission was held in October 1934, and the hearing before the District Court was held in September 1935.

Clearly the lapse of time is so great as to make any use of these findings, as evidence in this case, both unfair and prejudicial. Especially is this so where, as here, the facts have changed in the meantime. As we shall show later, *infra* Page 6, this brief, the once existing corporate relationship between the Coal Company, and the Lisbon and Y. & S. to which the Appellants point, was changed in the month of November, 1933, and thereafter the only relation between the Coal Company and the two named carriers was one of stock ownership. That change occurred almost a year before the events involved in the instant suit took place.

Attention is called to the fact that competent witnesses were available before the Commission who could have been examined by the Appellants as to the circumstances then existing respecting corporate relationships and Appellants could have offered evidence as to such matters. The Appellants, however, did not choose to bring out the existing facts, or make any point of those relationships (R. 120-121).

In the third place, wholly aside from the manifest injustice of an attempt to make evidence out of that which is not evidence, it is apparent that the manner of use by the Appellants of Judge West's Findings of Fact is prejudicial and unfair to the Appellees. Had the Appellants offered evidence before the Commission or the District Court respecting the corporate relationship of the Coal Company, the Y & S and the Lisbon, the Coal Company then would have had reason to offer and would have offered evidence respecting the existing facts. However, as has already been shown, the Appellants not only did not offer evidence respecting those corporate relationships, but expressly disavowed any imputation of unlawfulness concerning them,

and thereafter placed no reliance upon them either before the Commission or the District Court (R. 120, 121).

Inaccuracies of Statement of Fact.

At Page 27 of Appellants' brief, it is said, with reference to their statement of facts, that "There is no controversy between the parties as to facts so stated and as disclosed by the record." Sometimes, however, as already indicated, there exists a difference between the "facts so stated" by Appellants in their brief, and the facts "as disclosed by the record."

At pages 10 and 11 of Appellants' brief, Finding of Fact No. 11 of Judge West, in the case of *The Pennsylvania Railroad Company and The Pittsburgh & Lake Erie Railroad Company* v. *The Pittsburgh, Lisbon & Western Railroad Company, et al.*, in equity No. 4533 in the District Court of the United States for the Northern District of Ohio, Eastern Division, (R. 215-216) is embodied almost verbatim in a paragraph purporting to be a statement of facts based upon the evidence in this case.

We have already pointed out that such use of the Findings of Fact in that case is improper. In this connection, however, we call the Court's attention to the fact that the matters there recited, even if once true, did not exist for almost a year prior to the happening of the events involved in the instant suit. After the month of September, 1933,[1] there was not (and there has not been since) any community of officers or directors, nor was there any use of common office space, between the Pittsburgh Coal Company, and the Lisbon and Y & S.

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[1] Since September 1933, there have been no officers, directors or employees of the Coal Company who are also officers, directors or employees of the Pittsburgh, Lisbon and Western Railroad Company or the Youngstown and Suburban Railway Company; nor has the Coal Company had any joint or adjoining offices with those companies. The fact is that none of the officers, directors or employees of the Pittsburgh Coal Company have any interest in or connection with the two carriers. Although these statements are not based upon anything in the record in the instant case, they are supported by the Annual Reports of the two carriers for the years 1932, 1933, 1934 and 1935, which are on file with the Interstate Commerce Commission as a matter of public record.

In respect to the matters stated by Appellants pertaining to the corporate relationship between the Coal Company, and the Y & S and the Lisbon, it should be noticed that in that case Judge West refused to find the existence of any unlawful domination and control and concluded in his Finding of Fact No. 12 (R. 216):

> "That none of the common carrier defendants has or has had any direct interest or participation in the said enterprise complained of; that none of said carrier defendants is an agent or instrumentality of, or has been dominated by, the defendant Pittsburgh Coal Company respecting said enterprise; nor is the defendant Pittsburgh Coal Company an agent or instrumentality of, nor has it been dominated by, any of said common carrier defendants respecting the same."

We refer to this finding of fact not as evidence in this case, but as explanatory of the facts found by Judge West and only partially recited by Appellants in their brief.

It is said by Appellants that the coal involved in this suit was run through the preparation plant at Brush Run and then "dropped in cars suitably placed by the Lisbon and under Lisbon's power moved to and through Negley by employees of the Lisbon * * *". (Appellants' brief, Page 28.) The fact is, however, and the record shows, that the Lisbon did not place the cars where the coal could be dropped into them from the preparation plant. The manner in which the cars were loaded was as follows: The Lisbon turned over the empty cars to the Coal Company at the point of connection between the line of the Lisbon and the Coal Company's private switch track leading to the Brush Run preparation plant (R. 140). This plant is located some 2,000 or 3,000 feet distant from that point of connection (R. 138). The Coal Company's employees then hauled the empty cars by the Coal Company's engine over the private switch track into the plant where the cars were loaded (R. 139-140). After the cars were loaded at the plant the Coal Company's engine re-

turned the loaded cars back over the switch track to the point of connection with the line of the Lisbon (R. 139-140). Shipping orders were then given to the Lisbon for the common carrier transportation of the loaded cars (R. 139-140).

Appellants state, at Page 33 of their brief, that the Coal Company indirectly " * * * in due course by its own funds mingled with those of the Lisbon" constructed a link of railroad between Columbiana and Signal in Ohio. We shall deal later with the matter of the construction referred to, but here we respectfully invite inquiry by this Court of the Appellants as to where in the record or elsewhere there is so much as a syllable of evidence to justify the charge that the Coal Company ever "mingled" its funds with those of the Lisbon or vice versa.

Further, in Appellants' brief the statement is made (Page 33) that "* * * the Coal Company arranged for the movement from mines of origin through Smith's Ferry and its Brush Run washer to Negley, without bills of lading, * * *." It is perhaps fanciful, but we would ask Appellants just how and for what reasonable purpose a private industrial company would go through the farce of issuing a bill of lading to itself to cover a movement of its own coal over its own non common carrier mine tracks to its own river tipple, and thereafter by its own private barges and private non common carrier plant tracks to its own plant. The carriers seem to forget that the issuance of a bill of lading is not a ritual required to be performed before goods can be moved from one locality to another. Clearly a bill of lading is a transportation contract requiring the existence of two parties, one a shipper and the other a carrier. It is, of course, not only impossible but useless for a person to contract with himself; and the issuance by the Coal Company of bills of lading to itself for the movement of its own coal from its mines to its plant would manifestly be nothing but solemn nonsense. *M. D. Friedman Co.* v. *C. & O. Ry. Co.*, 194 I. C. C. 455.

If, however Appellants are implying that the Coal Company should have handled the transportation of its run of mine coal from its mines to its Brush Run plant by issuing bills of lading to Ohio purchasers of its prepared coal, we point out that no one but the Coal Company had any rights or interest whatever in the coal transported to the plant; that there were no such purchasers of the run of mine coal; that the Coal Company owed no duties to anyone in respect to its private transportation of its run of mine coal to the plant. Reference to the record discloses that the raw coal was not sold or even contracted to be sold (R. 147-148). Only the prepared coal, the product of the Brush Run plant, is sold or contracted to be sold (R. 153), for the raw coal from which it is prepared is not readily salable in northeastern Ohio (R. 149). The raw coal which was moved to the Brush Run plant was not "shipped" over the plant tracks of the Coal Company by or to any purchaser or prospective purchaser (R. 150). There is nothing in the record to suggest that the Coal Company did not at all times have the right, had it so desired, to take the identical raw coal which was moved up to the Brush Run plant and there destroy it or move it back to Pennsylvania or dispose of it to any person or in any manner it saw fit, without incurring any liability to its customers, who eventually purchased the four carloads of prepared coal, or to anyone else.

ARGUMENT.

I. THE COAL COMPANY'S PROJECT FOR MARKETING COAL IN OHIO MARKETS IS OF A PRIVATE INDUSTRIAL CHARACTER.

The Coal Company, for reasons that are explained herein, is desirous of disposing of its coal in northeastern Ohio markets and beyond. As will be shown from the evidence, the modern requirements of coal consumers are such that coal in the nature and form in which it is taken from the mines is no longer a readily marketable product.

Modern marketing conditions and modern methods of fuel consumption require that coal be prepared and processed into a new and different product from the raw run of mine coal. This change is effected by industrial plants known variously as preparation plants, coal cleaning plants, or coal washers.

It goes without saying that the Coal Company, like any other company, is interested in the question of seeing that its operations are conducted as economically and as efficiently as possible. Because, as will be shown, the Coal Company has long owned and operated its own river fleet of steamboats and coal barges, it is desirous of making use, as far as possible, of its own cheap river transportation along the water ways in any movement of its coal to markets in Ohio or elsewhere. Such a movement enables the Coal Company to move its commodity at cost.

It hardly need be explained that private carriage is neither unlawful, against public policy, nor economically undesirable, however distasteful it may be to the trunk line carriers.

In the last analysis the refusal of the trunk line carriers to switch the four carloads of prepared coal involved in this suit is based solely upon the ever-existent hostility on the part of those carriers to any movement of a commodity that takes place by any means other than over their rails. The pretext for the refusal in the instant case happens to be the asserted question concerning the alleged interstate character of the movement of these four cars by common carrier railroads between two points in the State of Ohio.

Because of the many assertions in Appellants' brief concerning the motives of the Coal Company in marketing coal in Ohio, we propose to show from the testimony just what the Coal Company is doing and why it is doing it. Due to the fact that the Appellants, in their brief have repeatedly referred to coal preparation plants as if they were mechanical arrangements of some sort through which coal is "transferred" and incidentally washed with water and

sorted into sizes, we shall also make clear from the testimony the nature of the preparation process effected at such plants.

Testimony relating to the Coal Company's Brush Run Plant and its plant tracks.

The Coal Company is the owner of seven coal mines located on and accessible to the Monongahela River in Pennsylvania (R. 144). As the coal produced from those mines is a gas and by-product coal, it finds a logical market in northeastern Ohio, not only because the steel and manufacturing industries in that area are dependent upon coal of that kind and quality, but also because coal of that character is not produced in Ohio (R. 144).

It is to the great business advantage of the Coal Company to increase its sales of coal from those mines in the markets of northeastern Ohio for the reason that the Coal Company owns and operates its own barges and steam towboats on the Monongahela and Ohio Rivers (R. 145). In moving such coal to those markets, the Coal Company is therefore able to utilize the cheap river transportation (R. 144) made possible by the long river routes which run in the direction of the State of Ohio.

However, the coal produced in western Pennsylvania fields is not readily merchantable to the steel and other industries in the raw run of mine form in which it is taken from the mines (R. 145). If modern consumer demands, and modern methods of combustion are to be met, the run of mine coal must be prepared and sized to suit the needs of each particular consumer (R. 145-146).

In order to be able to sell its coal from its Monongahela River mines into the markets in northeastern Ohio, the Coal Company built a modern coal preparation plant at Negley, Ohio (R. 145).

The Brush Run plant was located near Negley, Ohio, for several reasons.

In the first place, the market for coal from these river mines is in northeastern Ohio. (R. 144-145) In the second place, the Coal Company desired a central preparation plant to serve its seven river mines (R. 149). It has been the policy of the Coal Company in the past to locate its preparation plants at places where each plant may be used to serve several mines rather than one mine alone (R. 149). The Coal Company's Champion Plant, for example, serves four inland mines (R. 149). Location of plants at central points makes, of course, for economies in operation and for savings in capital investment (R. 149). In the third place, a preparation plant designed to serve the output of the several river mines of the Coal Company must of necessity be located beyond the point of river-to-rail transfer if the prepared product of the plant is to be marketed as a prepared product (R. 153-154). This arises from the fact that the transfer from river barges to rail cars entails breakage and degradation of prepared coal to such extent that the retail dealer or consumer refuses to accept coal which is so broken that it is no longer coal of the same size which the dealer or consumer had ordered and which had been shipped from the plant (R. 153-154); hence, no preparation facilities exist or would be desirable at or near any of the river mines (R. 149, 143). As the preparation of coal at Brush Run takes place beyond the point of river-to-rail transfer, the Coal Company has avoided the degradation and destruction of the accurate sizing which would take place upon any transfer of a prepared coal from barges to rail cars (R. 170).

In the fourth place, the successful operation of a preparation plant requires that there be an abundance of cheap land available upon which the very considerable quantity of waste material which is taken from the run of mine coal can be disposed of cheaply without subjecting the Coal Company to nuisance suits because of the attendant air and water pollution (R. 169). The Brush Run site furnishes an ideal plant location in this respect in that the surround-

ing country is little inhabited and abundant inexpensive land for the storage of coal and coke and the dumping of waste material is available (R. 169-170). No such site exists along the Ohio River bank near Smith's Ferry, Pa. (R. 169-170).

The function of the Brush Run preparation plant is to transform raw run of mine coal into a readily merchantable product of the exact quality and size that the combustion facilities of the particular consumer demand (R. 145). Run of mine coal passing through the Brush Run plant is subjected to two distinct processes by which the character of the coal is changed (R. 154-162). By one process extraneous mineral matter and impurities, such as dirt, sulphur, slate, rock, pyrites, mica, calcite, and gypsum are removed from the coal (R. 154). In the normal operation of the plant about 4 per cent of all raw coal that is introduced into the plant is removed in the form of waste material which is discarded (R. 154). By another process the coal is accurately sized and the sizes mixed according to the specific demands of any particular consumer (R. 146). This plant is equipped to make any of 25 different sizes, and all combinations of different sizes and qualities by mixture of the various sizes and qualities in any desired proportions (R. 146-147).

As a result, the coal which comes out of the plant, is coal of a different character and size than the coal which entered the plant (R. 146). The run of mine coal which goes into the plant comes from several mines and is an accidental mixture of all kinds of coal of several sizes (from the finest dust to huge lumps) and of various impurities (R. 146). The resultant product of the preparation process, however, is a refined product of definite quality and size.

It is the Coal Company's intention to locate a plant at Brush Run for the carbonization of coal at low temperatures and the manufacture of a new smokeless carbon fuel, which the Coal Company is successfully manufacturing at the present time at another plant (R. 154-155).

For the information of the Court the Appellee has attached two photographs of the Brush Run plant in an Appendix to this Brief.

The product of the Brush Run plant is shipped to Ohio points over the line of the Lisbon with which the plant is connected by a switch track which is private to the Coal Company (R. 166). The run of mine coal is brought into the plant by plant tracks extending southwardly 10 miles to the Coal Company's unloading dock located on the Little Beaver River near its confluence with the Ohio River at Smith's Ferry, Pa. (R. 145). This track, together with the switch track which connects the plant with the Lisbon, is privately owned and operated by the Coal Company (R. 146, 153). The equipment used on these tracks consists of hopper cars and an engine which are likewise owned and operated by the Coal Company (R. 139). The Lisbon in no way operates over the switch track to the plant or over any other portion of the plant tracks; and did not operate over those tracks in the movement of the four carloads of prepared coal involved in this suit (R. 140).

Testimony relating to the four carloads of prepared coal prior to its shipment on the Lisbon.

The coal involved in this suit was mined from the Coal Company's river mines located on the Monongahela River in Pennsylvania, in the current course of operation of the mines (R. 147, 151). At those mines the coal is taken from the ground at points as far distant from the river as six and one-half miles (R. 151-152). The coal is then moved several miles under ground and brought to the surface at points still several miles distant from the river (R. 152). It is moved to the river over the privately owned and operated mine tracks of the Coal Company (R. 152).

At the river the coal, which is still in the run of mine form in which it was taken from the mines, is then transferred by

a private tipple, which the Coal Company owns and operates, from the mine-cars into the Coal Company's private river barges (R. 152).

The coal involved in this suit was originally some unascertained portion of 239 tons of run of mine coal which was loaded into a barge from the tipple on August 2, 1934 (R. 147, 149). The coal was then moved by the Coal Company's privately owned and operated steamboat down the Monongahela River to the Coal Company's river harbor at Risher, Pa., where it lay until August 25, 1934 (R. 147-148).

On August 25, 1934, it was started on its movement down the Monongahela and Ohio Rivers by the Coal Company's steamer to the Coal Company's loading dock at Smith's Ferry, Pa., near the confluence of the Little Beaver River and the Ohio River (R. 147). This movement, as well as the subsequent movement of the coal, can be traced graphically on the sketch which is attached in an Appendix to this brief.

Some time between the time when the barge left the Risher harbor in Pennsylvania and arrived at the Brush Run plant in Ohio, the Sales Department of the Coal Company obtained orders for four carloads of prepared coal of specific quality and size (R. 148). These orders or contracts to sell were not, however, for run of mine coal, nor did they obligate the Coal Company to process and thereafter deliver a prepared product made from the particular barge load of coal before mentioned (R. 147, 148, 149, 150).

The particular barge load of 239 tons of run of mine coal was not during this time or at any later time either sold or contracted to be sold in whole or in part (R. 148). The consumer of prepared coal is not particularly interested in the question of from what run of mine coal the prepared product is made, and from his standpoint is interested only in the quality and size of the prepared product which leaves the plant (R. 149). When the coal contained

in the particular barge that went to Smith's Ferry, was moved from the mine tipple, it could not be told where or to whom any particular portion of the coal was going (R. 150). In the current course of operation of the mines and plant, the Coal Company does not even know, at the time of arrival of the run of mine coal at the Brush Run plant, just where the resulting cars of different qualities and sizes of coal that is turned out of the plant may ultimately go (R. 151, 157, 158).

Only the prepared product of the plant is sold or offered for sale (R. 159, 150). The customer takes the prepared coal f.o.b. the tracks of the Lisbon (R. 150).

Without in any way being the subject of sale or barter, the 239 tons of run of mine coal were removed from the barges at the Coal Company's unloading dock at Smith's Ferry, Pa., and transferred to its private cars on the Coal Company's plant tracks and moved by the Coal Company's engine to the Brush Run plant in Ohio (R. 146). On arrival at the plant, the coal was dumped into a large concrete pit, and taken into the plant by a belt conveyor (R. 146).

From the barge load of 239 tons of run of mine coal which arrived at the plant, there was prepared one car of furnace coal, one car of block coal, and two cars of mixed nut, stoker, and slack coal (R. 167; Ex. 8, R. 198; Ex. 12, R. 201; Ex. 15, R. 202; Ex. 17, R. 203). The contents of these four carloads did not, however, account for all the coal that went into the plant (R. 146, 149) from the particular barge load of 239 tons of run of mine coal. There was, of course, the usual wastage of foreign material to the extent of about 4 per cent of the whole (R. 146), and in addition, another partial carload of prepared coal which was not sold (R. 149). That coal which was loaded out of the plant was not the same kind, form, or size of coal which had entered the plant (R. 146).

It was these four carloads of prepared coal above mentioned that were sold out of the plant, and thereafter shipped to purchasers via the Lisbon (R. 150). No com-

mercial dealings of any sort took place in respect to the run of mine coal which went to the plant (R. 161). Only prepared coal was the subject of barter and sale, and the Coal Company's ownership of that product did not cease until after commitment to the common carrier Lisbon for shipment (R. 153).

II. THE OWNERSHIP BY THE COAL COMPANY OF THE STOCK OF THE LISBON AND THE Y. & S. IS IRRELEVANT TO THE ISSUES OF THE CASE.

We have already commented upon the obviously improper use (as if evidence in this case) of certain Findings of Fact of Judge West in a suit brought by The Pennsylvania Railroad Company and The Pittsburgh and Lake Erie Railroad Company to enjoin the construction of the Coal Company's private plant tracks serving the Brush Run plant, as a violation of Section 1 (18) of the Interstate Commerce Act. It has been shown also that at the time of the events out of which the instant case arose, the corporate relationship between the Coal Company, and the two carriers whose stock it owns had ceased to be other than that of stock ownership.

However, whether proper or not, the injection of these matters of past history into the case is not only immaterial but also irrelevant to the issues presented.

The point which Appellants apparently desire to make of these past matters is stated on Page 27 of their brief where they refer to the private movement of the raw coal and the subsequent shipment of prepared coal over the Lisbon as "an attempt to evade the lawful interstate charges for switching at Youngstown".

The Proposed Extension of the Lisbon in 1929.

Appellants make much of the once proposed extension of the common carrier Lisbon whose stock the Coal Company

owns. Appellants say that the once proposed extension of the common carrier Lisbon is the same thing in point of law and fact as the operation by the Coal Company of its Brush Run preparation plant and the plant tracks appurtenant thereto. We shall analyze the charge.

Admittedly the Coal Company favored that extension. The proceedings before the Interstate Commerce Commission for the purpose of obtaining the consent of that body to the proposed extension were openly and frankly favored by the Coal Company, as well as by numerous Youngstown industries, as reference to the report of the Commission in *Construction of Branches by Pittsburgh, L. & W. R. Co.*, 150 I. C. C. 43, will show.

Briefly, the proposed extension of the Lisbon contemplated the construction of a new line of railroad about 40 miles in length and connecting the Ohio River at Smith's Ferry, Pa., with Youngstown, Ohio. This would have permitted western Pennsylvania coal moving, for example, from Connellsville, Pa., to Youngstown, Ohio, as it now moves on an all-rail haul of 140 miles, to have been moved by a river and rail route of 100 miles by river and 40 miles over the proposed line of the Lisbon, with considable saving in coal transportation costs.

The Pittsburgh and Youngstown districts are competitive iron and steel manufacturing communities, each of which consumes many millions of tons of bituminous coal annually. The principal source of this coal is the mines of western Pennsylvania and mainly the river mines located along the Monongahela River. As the mills of the Pittsburgh district are located along the Monongahela, Allegheny and Ohio Rivers as far down as Wheeling, W. Va., they have long enjoyed cheap water transportation of coal from the western Pennsylvania mines located on the upper Ohio River system of inland waterways. Youngstown, however, being located some 40 miles inland from the waterways system, had always been denied the boon of the cheaper water transportation. In consequence, it has suf-

fered in competition with its Pittsburgh district competitors because of the greater cost of transportation which it must pay to secure coal. The proposed extension of the Lisbon was designed to remedy that situation.

Although the Interstate Commerce Commission refused to authorize the proposed extension of the common carrier Lisbon, it found:

> "Public convenience and necessity, in the broader sense, require the combined use of all the agencies which can contribute to adequate and efficient transportation at the lowest cost." *Construction of Branches by Pittsburgh, L. & W. R. Co., supra,* p. 53.
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> "The evidence shows that it is practicable and desirable that the Youngstown district should have access to the Ohio River by rail line or lines which will afford them substantially the transportation advantages, including rates proposed by the applicants in this case. The advantages of the utilization of the Ohio and its connecting waterways have been amply demonstrated and the rail carriers should realize that they can not continue to handle by all-rail routes much traffic which can be more economically transported by all-water or rail-and-water routes. The interveners [*i. e.,* these Appellants] express fear that lower rates over a rail-and-water route will jeopardize the present rate structure, but, assuming such fear to be well founded, that fact would not justify us in withholding approval of any plan which promises to reduce substantially the cost of necessary transportation." *Construction of Branches by Pittsburgh, L. & W. R. Co., supra,* pp. 54-55.

The Youngstown & Suburban Connection With the Lisbon.

Thereafter, the Y. & S. extended its interurban electric line from Columbiana to Signal, Ohio, about 6½ miles to connect with the Lisbon at Signal, Ohio. This extension was made without seeking authority therefor from the Interstate Commerce Commission for the reason that such permission was not necessary because of the provisions of Section 1 (22) of the Interstate Commerce Act. Subse-

quent to that extension, the Interstate Commerce Commission, in another proceeding where a similar question arose, found that the position taken by the Y. & S. in this respect was correct, saying in *Youngstown and Suburban Railway Company Operation*, 175 I. C. C. 699:

> "The applicant's line extends from Youngstown southerly to Leetonia, 19.15 miles, and a branch extends from Columbiana Junction to Signal Junction, 6.45 miles. This branch was constructed in 1930 without securing a certificate of public convenience and necessity from us." (p. 699)
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> "The applicant is not owned or controlled by any other carrier and is not operated as a part of a general steam-railroad system of transportation." * * *
>
> "Under the circumstances we are of the opinion that the applicant is still an interurban electric railroad within the meaning of Section 1(22) of the Act; that it is not operated as a part of a general steam railroad system of transportation, and that we are without jurisdiction over the present application." (p. 700)

The Coal Company's Private Enterprise.

The construction by the Coal Company of its preparation plant at Brush Run and the appurtenant plant tracks followed all of these matters recited above. The method of operation of the plant and its appurtenant tracks has already been described and its private and industrial character made clear.

It was the construction of the Brush Run plant tracks that was the subject matter of the litigation before the United States District Court for the northern district of Ohio, Eastern Division, in equity No. 4533 (*Pennsylvania Railroad Co. and Pittsburgh & Lake Erie R. R. Co.* v. *Pittsburgh, Lisbon and Western Ry. Co. et al.*), where the trunk line carriers alleged that the plant tracks were to be devoted to a common carrier use, and sought to enjoin their construction as a violation of Section 1(18) of the Interstate Commerce Act.

Plaintiffs there brought before the Court all the matters which Appellants have borrowed from the findings of fact in that case and introduced in this case for the first time on appeal. In dismissing an application for a preliminary injunction, Judge West stated in a memorandum opinion (R. 210) in respect to these matters:

> "While the Coal Co. owns all the stock of the Pittsburgh, Lisbon & Western Railroad and practically all that of the Youngstown & Suburban, and because of this and the fact that a majority of the directors of the railroads are either directors, officers, or employees of the Coal Co., the latter may be said to control the carriers, yet it can not be found from the evidence before me that the Lisbon, which is a public common carrier, is a mere agent or instrumentality of the Coal Company. Consequently I find no basis for the holding desired by the plaintiffs that the corporate entities of these defendant companies should be disregarded in order to prevent the loss to the public which the Interstate Commerce Commission evidently felt when it rejected the application of the Lisbon, would result from the extension of that railroad. And further, this privately owned and constructed track is an entirely different enterprise in point of law from the attempted extension of the Lisbon. Being, so far as the court is now advised, lawful and not within the purview of the act, it may not be adjudged unlawful through the application of the rule that corporate entities may be disregarded to prevent abuse of public rights. That rule would probably apply and the trackage, even though constructed by the Coal Co., at its own expense and on its own property, might well be held an extension of the railroad if the track were to be employed in common carriage. For that would be the kind of extension within the purview of the law, and without commission consent it could not properly be made by the Coal Co., the sole stockholder of the Lisbon, any more than by the railroad itself."

And in dismissing the Bill of Complaint by final decree (R. 211), the same judge concluded *inter alia* as a matter of law (R. 217) that:

"3. That the construction and operation of said private railroad tracks by defendant Pittsburgh Coal Company, for its own purposes, is not within the provisions of Section 1, paragraph 18 to 22 of the Interstate Commerce Act requiring a certificate of public convenience and necessity first to be obtained from the Interstate Commerce Commission in certain instances, nor can the before-mentioned private railroad tracks of the defendant Pittsburgh Coal Company be deemed or construed to be an extension of the lines of the common carrier defendant, Pittsburgh, Lisbon & Western Railroad Company, within the meaning of said Act.

"4. That the construction of said private railroad tracks by the defendant Pittsburgh Coal Company for its own use is not a violation of the order of the Interstate Commerce Commission, of March 16, 1929, denying the certificate of public convenience and necessity prayed for by the Pittsburgh, Lisbon & Western Railroad Company to construct branch lines in the proceedings cited as 'Construction of Branches by Pittsburgh, Lisbon & Western Railroad Company', 150 I. C. C. 43; 150 I. C. C. 619.

"5. That the privately owned and constructed track of the Pittsburgh Coal Company is an entirely different enterprise in point of law from said proposed extension of Pittsburgh, Lisbon & Western Railroad.

"6. That the privately owned and operated track of the defendant Pittsburgh Coal Company is a lawful enterprise and being lawful may not be adjudged unlawful through the application in this case of the rule that corporate entities may be disregarded to prevent abuse of public rights.

"7. That there is no equity in the complainants' Bill of Complaint or Supplemental Bill of Complaint, and the same should be dismissed at the costs of the complainants."

The Coal Company's enterprise is not the same thing as the once proposed Lisbon extension either in Law or Fact.

Can it be said, as Appellants infer, that the use by the Coal Company of its Brush Run plant with its private

tracks is the same thing in law or in fact as the once proposed Lisbon extension in 1929. We submit that both in fact and law the two are different, and that a comparison will show that the differences between the once proposed extension of the Lisbon and the Coal Company's industrial activities are both real and substantial.

The Lisbon is a common carrier, chartered to do a common carrier business, which it does in fact. As it engages in interstate commerce, its activities are subject to both State and Federal regulation. Its proposed extension, as will appear by reference to the report of the Commission in 150 I. C. C. 43, was designed to serve the public in the common carriage in interstate commerce of the goods of all who offered them for transportation. It contemplated transporting a very large tonnage of coal *to* and a large tonnage of finished steel products *from* those Youngstown industries who supported its application. (See 150 I. C. C. 43.) In its proposed extension it could have employed the power of condemnation by the right of eminent domain.

The Coal Company, on the other hand, is a purely private industrial company. It is not in fact a common carrier, and it has no charter power to engage in a common carrier business. In fact it transports no one's property except its own. It has no prospect of transporting the large tonnage of coal shipped by Youngstown industries from their own mines or of transporting their finished steel products. The property which it does transport has been extracted from its own coal mines by its own mining operations. It buys no coal for the purpose of transporting it.

The Coal Company neither carries the goods of others for hire directly or indirectly, nor does it hold itself out to perform such services for hire. It has none of the attributes of a common carrier.

When the Coal Company moves its run of mine coal either over its mine tracks or in its river barges or over its plant tracks to the Brush Run plant, it is not making a common carrier use of any of its facilities. No other company is

permitted to, nor has any other company the right to, use the private transportation facilities of the Coal Company. The acquisition of those facilities came about by private purchase without aid of the power of eminent domain, a power which the Coal Company does not have.

It is not our purpose here to argue the issues raised in the case decided by Judge West which involved the legality of the construction and operation of the plant tracks; but we point out that paragraph (1) of Section 1 of the Interstate Commerce Act limits the application of the Act and the jurisdiction of the Commission to common carriers, in fact or in law; that Section 1 (9) of the Act expressly recognizes the legality of private tracks built by shippers, and guarantees to the private tracks of an industry the right to connect with the line of an interstate common carrier. See *Cleveland C. C. & St. L. Ry. Co.* v. *U. S.*, 275 U. S. 404. Clearly, as Judge West held, the construction and operation by the Coal Company of its Brush Run plant and its plant tracks are not within the purview of the Interstate Commerce Act because the use is not one of common carriage, involves no common carrier, and does not involve interstate commerce but rather a private carriage which is incidental to the processing of a raw and unrefined commodity at the end of the movement. See *The Pipe Line Cases, United States* v. *Uncle Sam Oil Company*, 234 U. S. 548.

There is no Evasion of the Interstate Commerce Commission's Order or of Interstate Freight Rates.

With respect to the Appellants' statement that the Coal Company has violated the order of the Interstate Commerce Commission in 1929, denying the application of the Lisbon for permission to extend its lines, the nature of the Commission's order should be noticed. That order (entered at 150 I. C. C. 619) is purely negative in character, and we respectfully submit that it could not have

been violated even by the Lisbon whose application it refused. This Court stated, in the case of *Piedmont and Northern Ry. Co.* v. *U. S.*, 280 U. S. 469, respecting a similar order of the Interstate Commerce Commission denying an application of a common carrier for an extension of its lines under Section 1 (18-22) of the Interstate Commerce Act:

> "The order is entirely negative. It is not susceptible of violation and cannot call for enforcement. It does not finally adjudicate the railway's standing; nor does it enjoin it to do or refrain from doing anything."

As to the broader charge that the Coal Company is evading lawful interstate freight rates and inferentially some policy contained in the Interstate Commerce Act, we would remind Appellants that the route of the private movement of the Coal Company's coal is not at all the route of these Appellants to which their rates apply; that private carriage of one's own product on one's own land by one's own vehicles to a carrier of the shipper's own choosing is a perfectly lawful activity.

It is axiomatic that one may avail himself to the full of what the law allows him to do, and in so doing, he cannot be charged with evasion of a statute. The Interstate Commerce Act does not forbid by language or condemn by policy such private carriage of one's own goods. In such circumstances the question of evasion is beside the point. In *Bullen* v. *Wisconsin*, 240 U. S. 625, Mr. Justice Holmes said with respect to evasion:

> "We do not speak of evasion, because when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion, what is meant is it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

Could it possibly be said that a person is evading freight rates by choosing to carry privately the product of his own industry over his own land by rail or truck (or even by wheelbarrow) to any point he sees fit before he ships that product over a carrier? We respectfully submit that it is impossible to evade or violate an order that is not susceptible of violation, and that it is impossible to evade an interstate freight rate by an activity that is wholly without the scope and policy of the Interstate Commerce Act.

Appellants misconstrue the Southern Pacific Terminal Company case.

The error pervading the Appellants' argument respecting evasion is illustrated by the case of *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and Young,* 219 U. S. 498, upon which they place great reliance at Pages 39-43 of their brief. They fail to note the public character of the terminal facilities there involved and the fact that those facilities were in fact devoted to a public use.

In that case the Southern Pacific Terminal Company was chartered for the express purpose of taking over and operating certain land as a *public terminal* in conjunction with the Southern Pacific Railroad System. That land was pledged by its very conveyance to a public use for wharfage purposes; and by municipal ordinance as well as by statute expressly subjected to the same use.

The Court there pointed out:

> "* * * that the terminal facilities contemplated by the ordinance of the city of Galveston and the act of the legislature of Texas confirming it *were public terminal facilities,* not those which might be granted or withheld in preferences or discriminations." (P. 525; italics ours)
>
> * * * * * * * *
>
> "It is clear, therefore, that it was the purpose of the ordinance and of the act confirming it to secure shipping facilities for the city, *open, to public use;* and nec-

> essarily so, for the property was to be the terminal of a railroad and steamship system. It may be, as it is contended, that there was no necessity for the ordinance, 'except for the purpose of a valid relinquishment of the municipal right, often asserted by it, of opening streets through the bay-front property and constructing wharves thereon.' The relinquishment was treated as valuable, and Huntington *pledged the property to a public use* as a consideration of it. And, as we have said, such use was also a condition expressed in the act of the legislature." (P. 518, italics ours)

Part of this land the Terminal Company shut off from public use, and leased to one Young at such a favorable rental that he was given a decided business advantage over his competitors, who were forced to pay the Terminal Company's regular public wharfage rates. The facts clearly show that the Terminal Company, over this land, was engaged in a public business in interstate and foreign commerce. Young likewise was engaged in interstate commerce and frequently allowed the public to use at a fixed charge the properties which had been leased to him.

In a suit brought to enjoin the preference, it was held that the Interstate Commerce Commission had jurisdiction to enjoin the preference arising from the lease to Young, although the Terminal Company was not a chartered railroad company.

The following comparisons which the Appellants did not make are pertinent:

(1) The wharfage facilities which the Terminal Company operated were pledged and devoted to a public use, and required by statute to be open to the public. The public had a legal right to use the land leased to Young upon equal terms with him.

The private transportation facilities of the Coal Company are wholly private to it alone, and have never been otherwise. The public does not have and never has had a right to use or put foot upon any of its facilities.

(2) The Terminal Company in fact conducted a public wharfage business for the public generally over its wharfage facilities; it had by practice a factual utility status. The wharf was in fact a public facility.

The Coal Company does not and never did carry anyone's goods except its own upon its private transportation facilities; and it does not and never has permitted any common carrier or anyone else to use those facilities. They are in fact and law wholly private.

(3) When the Terminal Company took part of the wharfage facilities and by a lease to Young shut off that part from public use, it was committing a fraud on public rights.

The Coal Company's private facilities are owned by it in fee simple and have always been owned and operated by it solely in its own business for the transportation of a product which, even before its extraction from the ground, always belonged to the Coal Company.

(4) Both the Terminal Company and Young were engaging in interstate or foreign commerce over the wharfage facilities.

The coal that is moved by the Coal Company over its facilities is not in commerce; it is moved not to market but for preparation for market. See brief of Appellees, Public Utilities Commission of Ohio, and John W. Bricker, Attorney General of the State of Ohio, Pages 18-33; The Pipe Line Cases, *U. S.* v. *Uncle Sam Oil Company*, 234 U. S. 548.

(5) The commodities which were handled over the wharfage facility by the Terminal Company and by Young were delivered to that facility by a common carrier railroad, the Galveston, Harrisburg and San Antonio Railway. Those commodities, therefore, had been committed for shipment to a common carrier railroad for transportation in commerce before their arrival at the wharfage facilities.

In the instant case the run of mine coal reached the Brush Run preparation plant by a movement over non common carrier transportation facilities purely private to the Coal Company alone. The run of mine coal so transported to the Brush Run plant was never committed for shipment in commerce to a common carrier, and was not the subject of barter or sale.

(6) The acts of the Terminal Company were within the scope and policy of the Interstate Commerce Act, which clearly condemns the granting of a preference or discrimination by a common carrier. The Terminal Company was in fact a common carrier handling goods which were in interstate or foreign commerce when they passed over the wharfage facility; and the lease to Young was plainly a discrimination against the shipping public and a preference to him.

The use by the Coal Company of its Brush Run plant and plant tracks is not at all within the purview or the policy of the Interstate Commerce Act, which has no application to the purely private carriage of one's own goods on one's own land.

No doubt the reason for Appellants' reliance upon the *Southern Pacific Terminal Company Case* is due to the fact that the Court there disregarded the separate entity of the Terminal Company in reaching a fraud which had been committed. That action was taken by the Court in pursuance of the equitable doctrine that a court of equity will disregard the entities of related corporations where necessary to prevent a fraud on a statute. The principle does not have application, however, simply because one corporation owns the capital stock of another or because there is a community of officers or directors between the two corporations, with the resulting control made possible by the existence of those relationships.

It is well settled that the ownership by one corporation of all the capital stock of another corporation does not in

law make the two corporations one or result in their separate entities being disregarded. *Pullman's Palace Car Co.* v. *Missouri Pacific R. Co.*, 115 U. S. 587.

It is also true that identity of officers or directors of two corporations does not establish identity of the corporations. *Haskell* v. *McClintic-Marshall Co.*, 289 Fed. 405; *Pittsburgh and Buffalo Co.* v. *Duncan*, 232 Fed. 584; *Corsicana National Bank* v. *Johnson*, 251 U. S. 68.

Likewise, the entities of a group of corporations closely related by stock ownership and by agents and employees common to both corporations will not be disregarded because of loans made by one of the corporations to the other. *Peterson* v. *Chicago R. I. & P. R. Co.*, 205 U. S. 364.

The exercise of control by one corporation over another does not result in the application of the doctrine by which the separate entities of corporations affiliated by stock ownership or otherwise are disregarded. The additional element of fraud or wrong-doing is also necessary before resort is had to such extraordinary action.

Mr. Powell, in his book on "Parent and Subsidiary Corporations", says concerning the elements that are indispensable to an application of the doctrine:

> "* * * the whole basis of the doctrine of disregarding the corporate entity logically requires that the proof must show not only an excessive control over the subsidiary but the actual exercise of that control in such a manner as to defraud or wrong the complainant.
>
> Taking up the cases on this point we find the question of fraud or wrong very generally interwoven by the courts in their discussions of the facts and of the law." (p. 40)

After quoting from numerous cases to illustrate his statement, the author states:

> "The courts in five jurisdictions have squarely held and pointed out that this element of fraud or wrong is necessary: California, Washington and the United States Circuit Courts of Appeals for the Fifth, Sixth

and Ninth Circuits, respectively. One jurisdiction—the United States Circuit Court of Appeals for the Second Circuit—has rendered an opinion that might be construed to the contrary, though it is not believed that the Court so intended." (p. 42)

That conclusion is well supported by the following cases, in which the question of the necessary elements to the application of the doctrine was clearly raised: *Gledhill* v. *Fisher & Company* (Supreme Court of Michigan), 262 N. W. 371; *Continental Securities & Investment Company* v. *Rawson,* 208 Cal. 228; *New York Trust Company, et al.,* v. *Carpenter, et al.,* 250 Fed. 668 (C. C. A. 6th); *Hooper-Mankin Company,* v. *Matthew Addy Co.,* 4 Fed. (2nd) 187 (C. C. A. 6th); *William Wrigley, Jr. Co.* v. *L. R. Larson, Jr. Co.,* 5 Fed. (2nd) 731.

In the *Southern Pacific Terminal Company Case* this Court, in disregarding the corporate entity of the Southern Pacific Company, did not deviate from the principles above stated. It should be observed that the facts in that suit presented a proper case for the application of the doctrine that a court of equity will disregard the separate entities of related corporations where and to the extent necessary to prevent a fraud on public rights.

The action of the Southern Pacific Terminal Company (which as has been shown, did a public business in fact, and engaged in interstate commerce as a common carrier) in shutting off the public from a wharfage terminal facility devoted both in fact and in law to public use, and in giving to one shipper a preferential lease of that part of the facility from which the public had been excluded, was clearly a fraud on public rights within the purview of the Interstate Commerce Act.

In the instant case, however, no facts exist respecting which it can be said that the Coal Company or the Lisbon or the Y. & S. has taken any action which offends the language or policy of the Interstate Commerce Act. Such as-

sertions as the one that the movement of the Coal Company's run of mine coal to its Brush Run preparation plant in Ohio is a method "adopted to achieve forbidden advantage," and that it bears "resemblance" to the facts of the Southern Pacific Terminal Case do not take the place of analysis. The Appellants do not point to facts showing fraud or evasion, because no such facts exist; they do not show where in the instant case there is anything offensive to the language or policy of the Interstate Commerce Act, because they know quite well that the private enterprise of the Coal Company is wholly without the scheme of regulation of the Act.

CONCLUSION.

It is apparent from the record in this case that the purpose underlying the Coal Company's private enterprise, which involves the movement of its run of mine coal by its cheap river and private track transportation to its Brush Run plant, is the improvement of its business position in the northeastern Ohio coal markets. There is nothing unlawful in such a purpose. The record also makes clear that these private transportation facilities are private in fact as well as in law; that no one except the Coal Company has any interest or participation in their ownership or use; that the movement of the Coal Company's run of mine coal over those transportation facilities to the Brush Run plant is not a transportation in interstate commerce within the purview of the Interstate Commerce Act; that the entire activity of the Coal Company in so transporting, processing and thereafter marketing its coal is wholly lawful and not within the scope or policy of that Act; that the Coal Company is doing only what it and any other industrial company has a lawful right to do in the precise manner that Congress has recognized and endeavored to foster by section 1 (9) of the Interstate Commerce Act.

We submit that there is no fraud; that the charge that interstate freight rates are being evaded is unfounded; that the ownership by the Coal Company of the stock of the Lisbon and the Y & S is irrelevant to the issues of the case; that interstate freight rates for services performed by a common carrier do not apply, and are not intended to apply, to a purely intrastate transportation because of previous movement of a commodity that is wholly private both in fact and in law.

This Appellee submits that the decree below is correct and should be affirmed.

Respectfully submitted,

DON ROSE,
Counsel for Appellee,
Pittsburgh Coal Company.

HOWARD M. SWARTZ,
Of Counsel.

APPENDIX.

The Interstate Commerce Act (Title 49, U. S. Code).

SECTION 1. (1) *Carriers subject to regulation.* The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *

SECTION 1. (2) *Transportation subject to regulation.* The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid; * * *

SECTION 1. (3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the

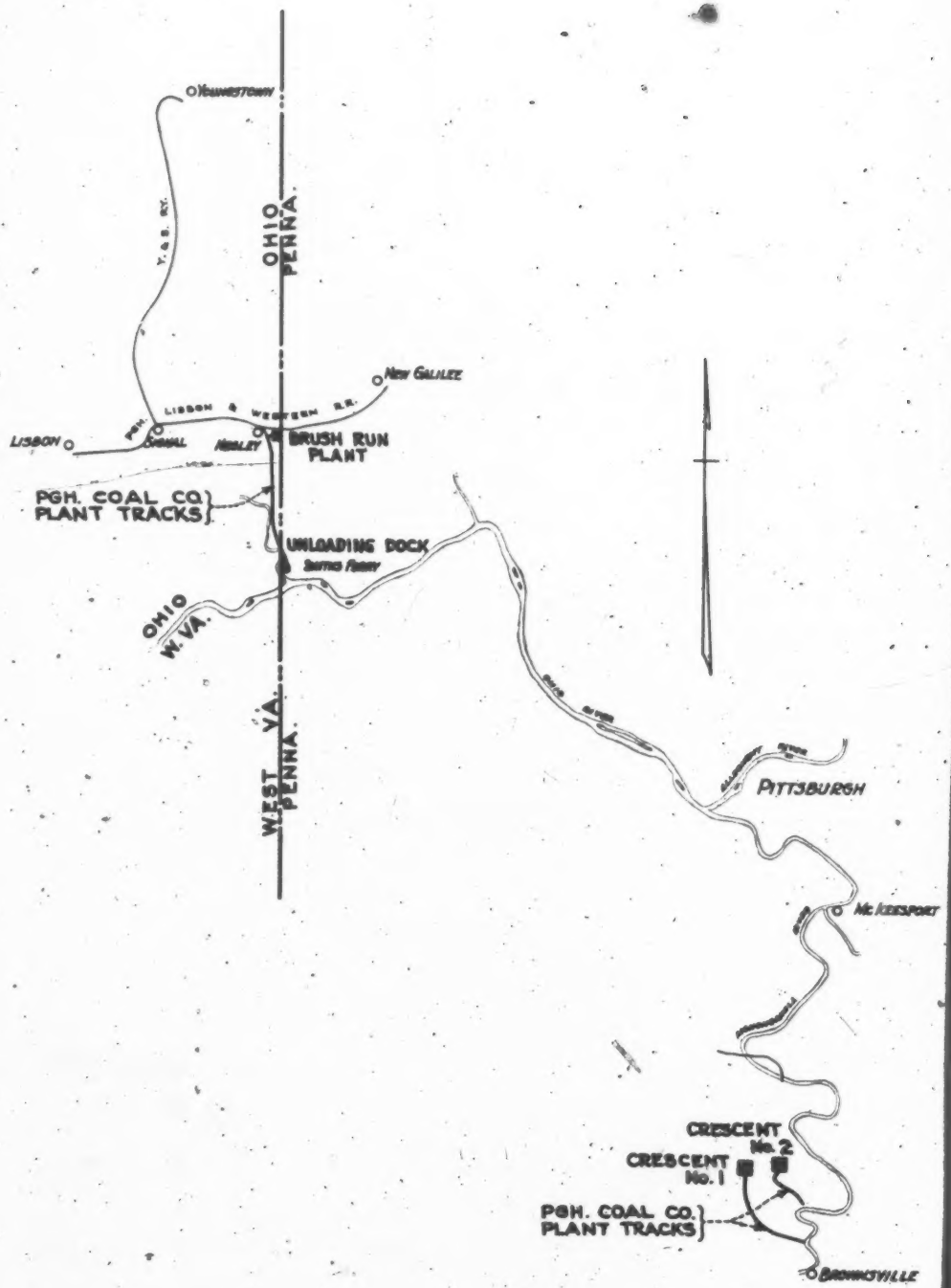
transportation of the persons or property designated herein, including all freight depots, yards and grounds, used or necessary in the transportation or delivery of any such property. * * *

SECTION 1. (9) *Switch connections and tracks.* Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section 13 of this chapter, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this chapter, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.

SECTION 1. (18) *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall

acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

SECTION 1. (22) *Construction, etc., of spurs, switches, etc., within State.* The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.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NEW GALILEE
LISBON & WESTERN R.R.
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LISBON
SIGNAL
ASHLEY
BRUSH RUN
PLANT
PGH. COAL CO.
PLANT TRACKS
UNLOADING DOCK
SMITHS FERRY
OHIO
W. VA.
WEST VA.
PENNA.
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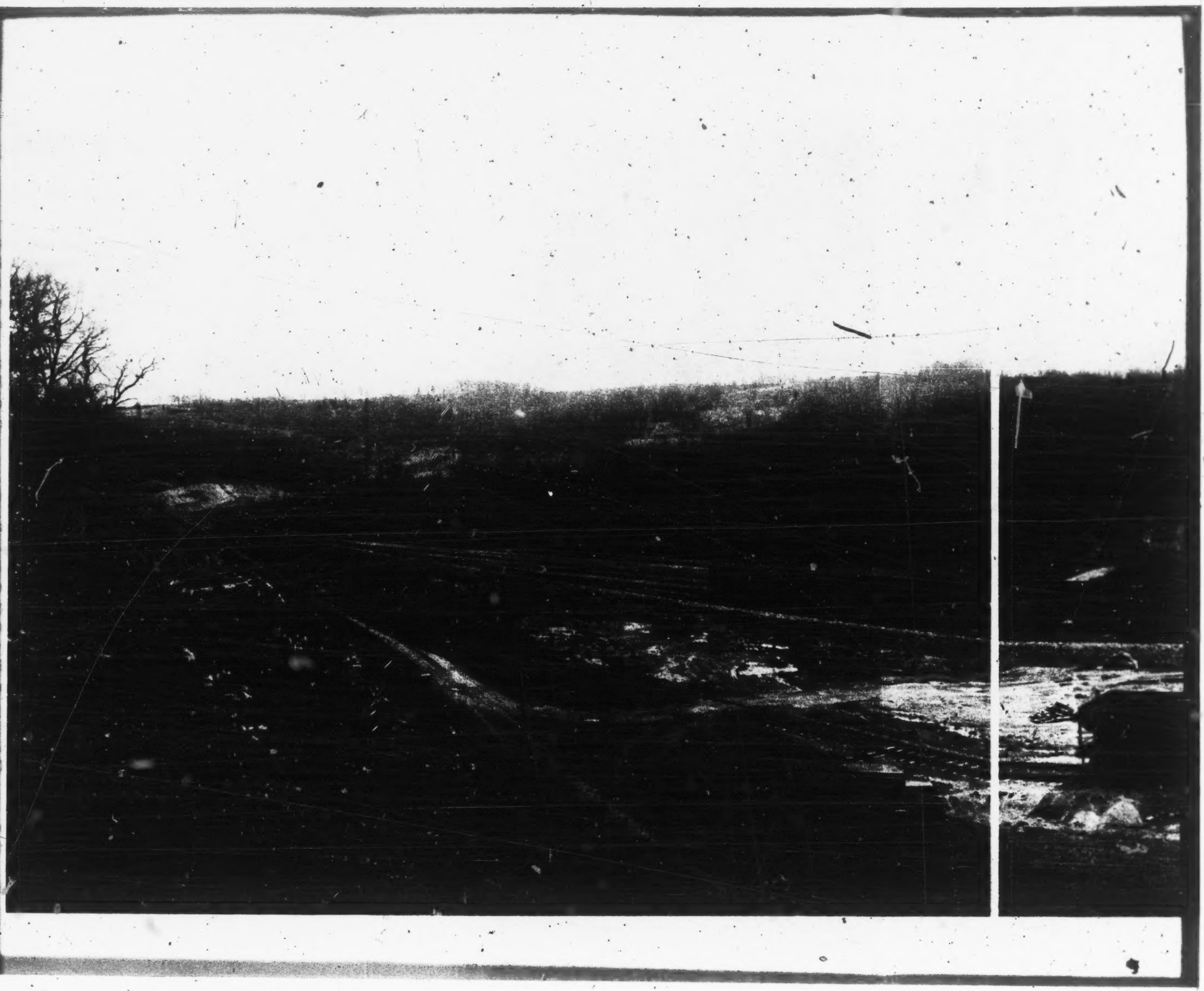

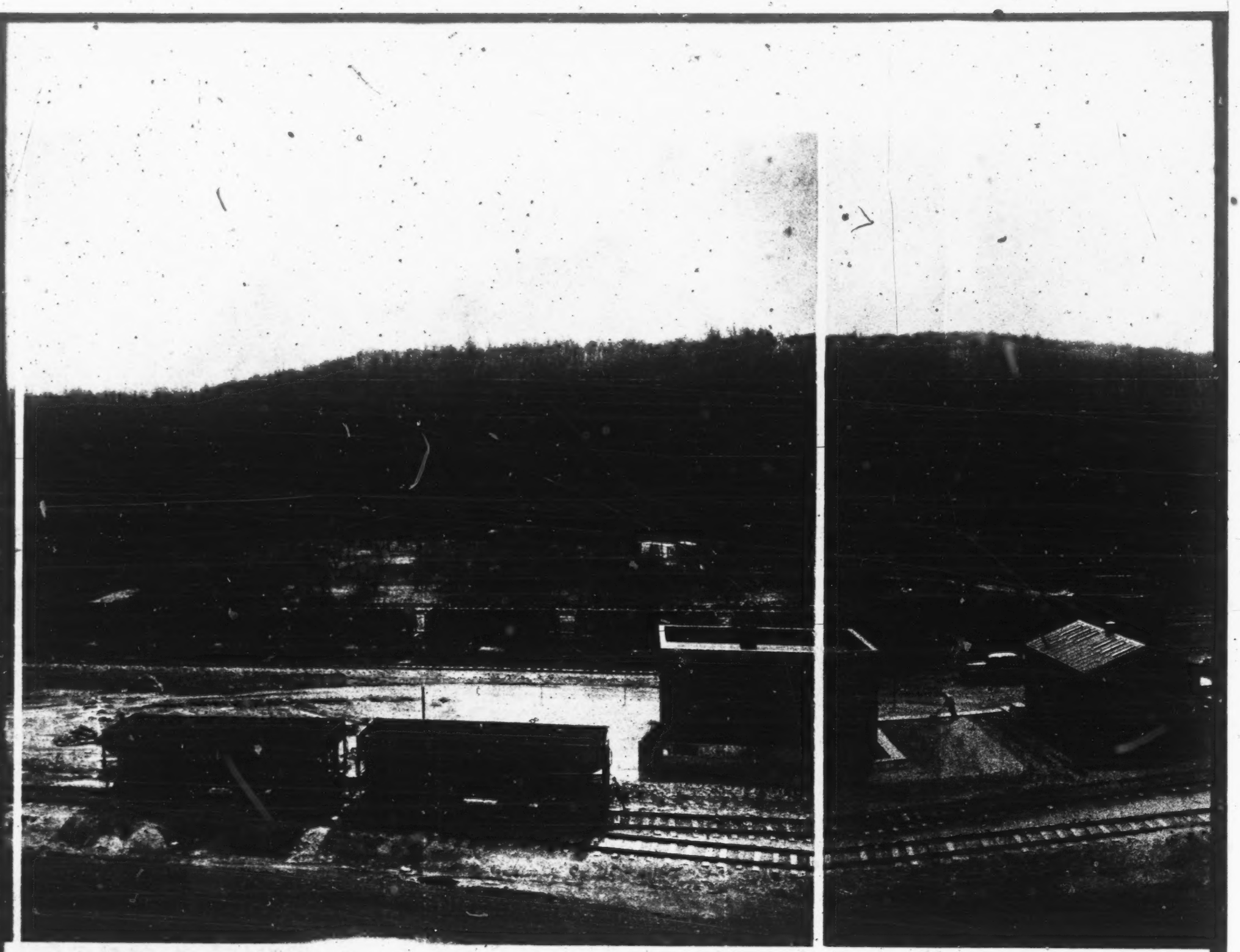

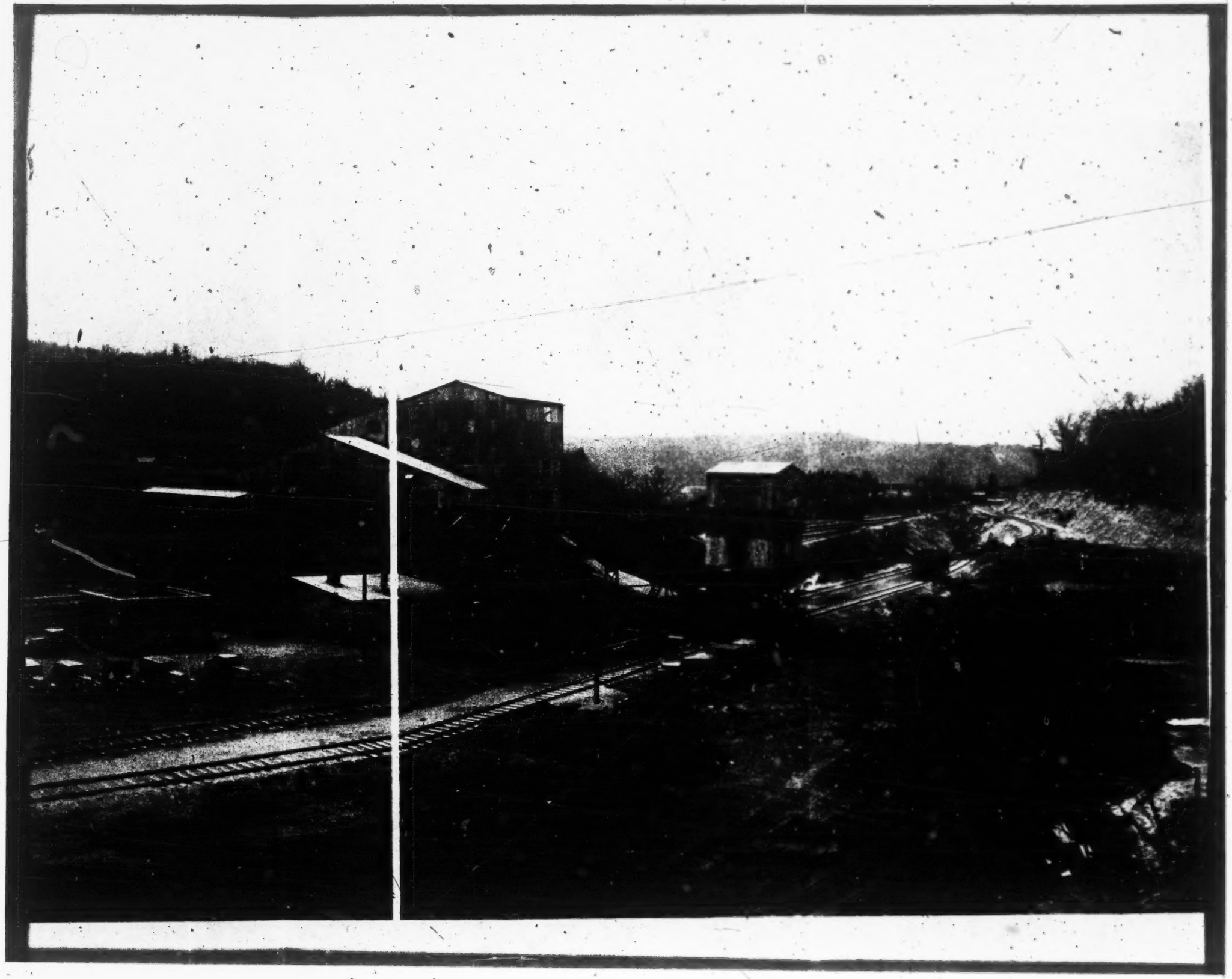

SUPREME COURT OF THE UNITED STATES.

No. 746.—October Term, 1935.

The Pennsylvania Railroad Company, Erie Railroad Company, The Baltimore and Ohio Railroad Company, and The Pittsburgh and Lake Erie Railroad Company, Appellants, *vs.* The Public Utilities Commission of Ohio, John W. Bricker, Attorney General of the State of Ohio, and Pittsburgh Coal Company.	Appeal from the District Court of the United States for the Southern District of Ohio.

[April 27, 1936.]

Mr. Justice Cardozo delivered the opinion of the Court.

An order of the Public Utilities Commission of Ohio directs the Pennsylvania Railroad Company and the Erie Railroad Company, appellants in this court, to adhere to local or intrastate rates in switching and delivering four carloads of bituminous coal to consignees in Youngstown, Ohio, and in switching and delivering any other carloads that may be tendered hereafter in similar conditions. The question is whether the effect of such an order as applied to the transactions exhibited in the record is to regulate common carriers by rail in the business of interstate transportation, and thus to trench upon the jurisdiction of the Interstate Commerce Commission.

Pittsburgh Coal Company, an appellee in this court, is the owner of coal mines in Pennsylvania, so situated that the product of the mines can readily be conveyed by use of the owner's cars and tipple to barges waiting to receive it on the Monongahela River. Much of the coal is sold to consumers in Ohio. The company has its own barges in which the coal is towed by its own tug boats, first over the Monongahela River and then over the Ohio, to Smith's Ferry, Pennsylvania. There it has its own right of way, with tracks and cars and engine. The coal, when transferred from the barges to

the cars, is taken over this right of way, a distance of about eleven miles, to Negley, Ohio. At Negley, or near by, is the Brush River Plant, owned by the coal company, where the coal is dumped from the cars, washed, freed from foreign matter and impurities, and broken up or assorted into the sizes desired by the customers. Then for the first time it is ready for shipment to fill specific orders, which often are not received until after it has left the mines. Up to that point the carriage has been solely by a private carrier, making use of its own facilities, its trains and tugs and barges.

At Negley the coal after being put in shape for sale is loaded upon the cars of the Pittsburgh, Lisbon and Western Railroad Company, referred to in the record as Lisbon, for transportation to consignees at Youngstown or elsewhere. Lisbon is a common carrier by rail, which connects at Signal, Ohio, with the tracks of the Youngstown and Suburban Railroad Company, referred to in the record as the Y. & S. The route of that line, about 22.2 miles, is between Signal and Youngstown, where there are interchange facilities with the Pennsylvania and the Erie.

On September 17, 1934, Lisbon received from the Pittsburgh Coal Company at Negley four carloads of bituminous coal to be transported via the Y. & S. to Youngstown, the cars to be there transferred, first to the Pennsylvania and then to the Erie, for delivery to consignees in Youngstown identified in the shipping orders. Lisbon and Y. & S. followed these instructions. Upon tender of the cars at the proper interchange track, Pennsylvania refused to accept or switch them except upon payment of the road haul charges on file with the Interstate Commerce Commission. The switching rates prescribed by the State Commission were $7.65 per car, a charge which covered the intermediate service of the Pennsylvania and the delivery service of the Erie. No switching rates for such traffic had been filed with the federal Commission by any of the trunk lines, but the haul charges, calculated to the next destination beyond, were $94.50 per car. Upon the rejection of the four carloads the Pennsylvania gave written notice to the Y. & S. that thereafter carloads of bituminous coal from mines outside Ohio would not be accepted for delivery within the Youngstown switching limits until all charges were prepaid at rates published in the tariffs on file with the federal Commission.

Following the receipt of this notice, the Y. & S. filed with the Ohio Commission its complaint against the Pennsylvania and the

Erie, the two companies having acted in concert in demanding the higher rates. Other lines, including the Baltimore & Ohio Railroad Company, and the Pittsburgh and Lake Erie Railroad Company, intervened in the proceedings, as did also the Pittsburgh Coal Company. After a full hearing the Commission held in a careful opinion that in the circumstances stated the State of Ohio had jurisdiction by its Commission to regulate the charges for switching services at Youngstown, and that the rates thereby prescribed were binding on the carriers. An order was made accordingly. This order was sustained by a District Court of three judges, application having been made for relief by injunction both interlocutory and final. Judicial Code § 266; 28 U. S. C. § 380. The case is here upon appeal. *Ibid.*

First: The transportation of the coal from Negley, Ohio, to Youngstown in the same state, was an intrastate service, not subject to the provisions of the Interstate Commerce Act, and its character in that regard was not changed because of preliminary carriage from the Pennsylvania mines in barges and cars belonging to the shipper.

Appellants say that from the moment the coal left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state, whether their identity at the beginning was known or unknown, and that a movement impelled by that intention is interstate commerce which Congress has the power to regulate at any stage of the ensuing transit. *Baltimore & Ohio S. W. R.* v. *Settle*, 260 U. S. 166, 173; *Ohio R. R. Commission* v. *Worthington*, 225 U. S. 101, 108; *Federal Trade Commission* v. *Pacific Paper Association*, 273 U. S. 52, 64. But there is confusion of thought in such a statement of the problem. Not all commerce is transportation, and not all transportation is by common carriers by rail. The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission. The Interstate Commerce Act (49 U. S. C. § 1 *et seq.*) is aimed at common carriers exclusively (§ 1 (1), (3)), and not even at all these. With exceptions plainly unrelated to this case (§ 1 (1) (b), (c)), carriers, even though common, are unaffected by the act unless they are

carriers wholly by railroad, or if partly by railroad and partly by water, are operating under "a common control, management, or arrangement for a continuous carriage or shipment". § 1 (1) (a). Cf. *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648; *Standard Oil Co.* v. *United States*, 179 Fed. 614; *National Transit Co.* v. *United States*; 178 Fed. 664. There are limitations, moreover, in respect of the conduct to be controlled in addition to the foregoing limitations in respect of the carriers to be regulated. Even though the activities are those of common carriers by rail, the statute does not apply "to the transportation of passengers or property * * * wholly within one State and not shipped to or from a foreign country from or to any place in the United States". § 1 (2) (a), (b). For many purposes, as for example in testing the validity of state taxation, merchandise is deemed to be in interstate commerce when it has started on its journey, though still in the possession of consignor or seller. *Hughes Bros. Co.* v. *Minnesota*, 272 U. S. 469, 475; *Champlain Co.* v. *Brattleboro*, 260 U. S. 366. Not so, however, in determining the application of this act. Transportation begins for that purpose, if not for others, when the merchandise has been placed in the possession of a carrier. *Hughes Bros. Co.* v. *Minnesota, supra; Coe* v. *Errol*, 116 U. S. 517, 528; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82, 95; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 527. And "wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier' ". § 1 (3).

With the aid of these definitions the problem before us takes on a new simplicity. The only transportation of this coal by a common carrier of merchandise either by railroad or by water was intrastate transportation in Ohio between Negley and Youngstown. The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively. Appellants would have us hold that this interstate transportation by an owner who does not carry for any one else will be tacked to the intrastate transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process. *The Pipe Line Cases*, 234 U. S. 548, 562; *McCluskey* v. *Marysville*

& Northern R. Co., 243 U. S. 36, 39, 40; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U. S. 257; *Campbell River Mills, Ltd.* v. *Chicago, Milwaukee & St. Paul R. Co.*, 42 F (2d) 775, 777, 778; aff'd, 53 F (2d) 69, 72, 73; *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 Fed. 334.

Two cases in this court (*United States* v. *Erie R. Co.*, 280 U. S. 98, and *Texas & New Orleans R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111) are put forward with special emphasis by appellants as supporting a different conclusion.

Of these, the first had to do with a shipment of wood pulp imported from abroad to Hoboken, New Jersey, where the merchandise was to be transshipped by rail to Garfield in the same state. The haul from Hoboken to Garfield was held to be subject to regulation by the federal Commission. The case differs from the one at hand in at least three particulars: (1) the carriage to Hoboken, as will appear from an examination of the record, was effected by a common carrier; (2) the ultimate consignee was known from the beginning; (3) the rail transportation was "in fact a part of foreign commerce". 280 U. S. at p. 102. Upon a shipment of merchandise to or from a foreign country, the Interstate Commerce Act applies to the carriage in this country, though that part of the carriage is within the limits of a single state. § 1 (1) (c), (2) (a). Cf. *Denver & Rio Grande R. Co.* v. *Interstate Commerce Commission*, 195 Fed. 968, 972; *Oregon-Washington R. & Navigation Co.* v. *Strauss & Co.*, 73 F (2d) 912; *Lees & Sons Co.* v. *Reading Co.*, 148 I. C. C. 603; *In re Transportation of Sugar*, 22 I. C. C. 558.

Texas and New Orleans Railway Co. v. *Sabine Tram Co., supra*, though differing in details from the case of the Erie Railway, illustrates the same principle, and is to be distinguished on like grounds.

Neither in the cases cited by the appellants nor in any others known to us has transportation by a common carrier been combined with carriage by an owner for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt. Such a fusion, if permitted, would lead to strange results. The situation laid before us would not be changed in its essentials if a coöperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to carry milk or vegetables from

Pennsylvania to a railroad station in Ohio. Even though this were done systematically and not casually or in sporadic instances, the ensuing transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress. If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be.

We have found it unnecessary to consider in the disposition of the case whether the treatment of the coal at Negley would break the continuity of the movement from the mines, even if interstate transportation would otherwise exist. Cf. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra,* at p. 526; *Alabama Great Southern R. Co.* v. *McFadden & Bros.,* 232 Fed. 1000; aff'd *McFadden & Bros.* v. *Alabama Great Southern R. Co.,* 241 Fed. 562; *Board of Trade of Chicago* v. *Olsen,* 262 U. S. 1, 33; *Arkadelphia Co.* v. *St. Louis, S. W. R. Co.,* 249 U. S. 134, 151, 152; *General Oil Co.* v. *Crain,* 209 U. S. 211.

Second: The appellants have woven into their brief a suggestion, not contained in their statement of points relied upon for reversal, that the ownership by the coal company of a controlling interest in the shares of the Lisbon and the Y. & S. has a bearing on the nature of the transit between Negley and the mines. There is insinuation, if not argument, that in building and operating a private right of way the coal company has nullified restraints imposed upon the railroads by the federal Commission, and for that reason must be treated as if it were a common carrier itself.

No such point was made in the complaint, nor do the assignments of error present it adequately here.

The decree should be affirmed, and it is

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.